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IN THE

Supreme Court of the United States

October Term, 1968

PIKES PEAK BROADCASTING COMPANY AND
SANGRE DE CRISTO BROADCASTING CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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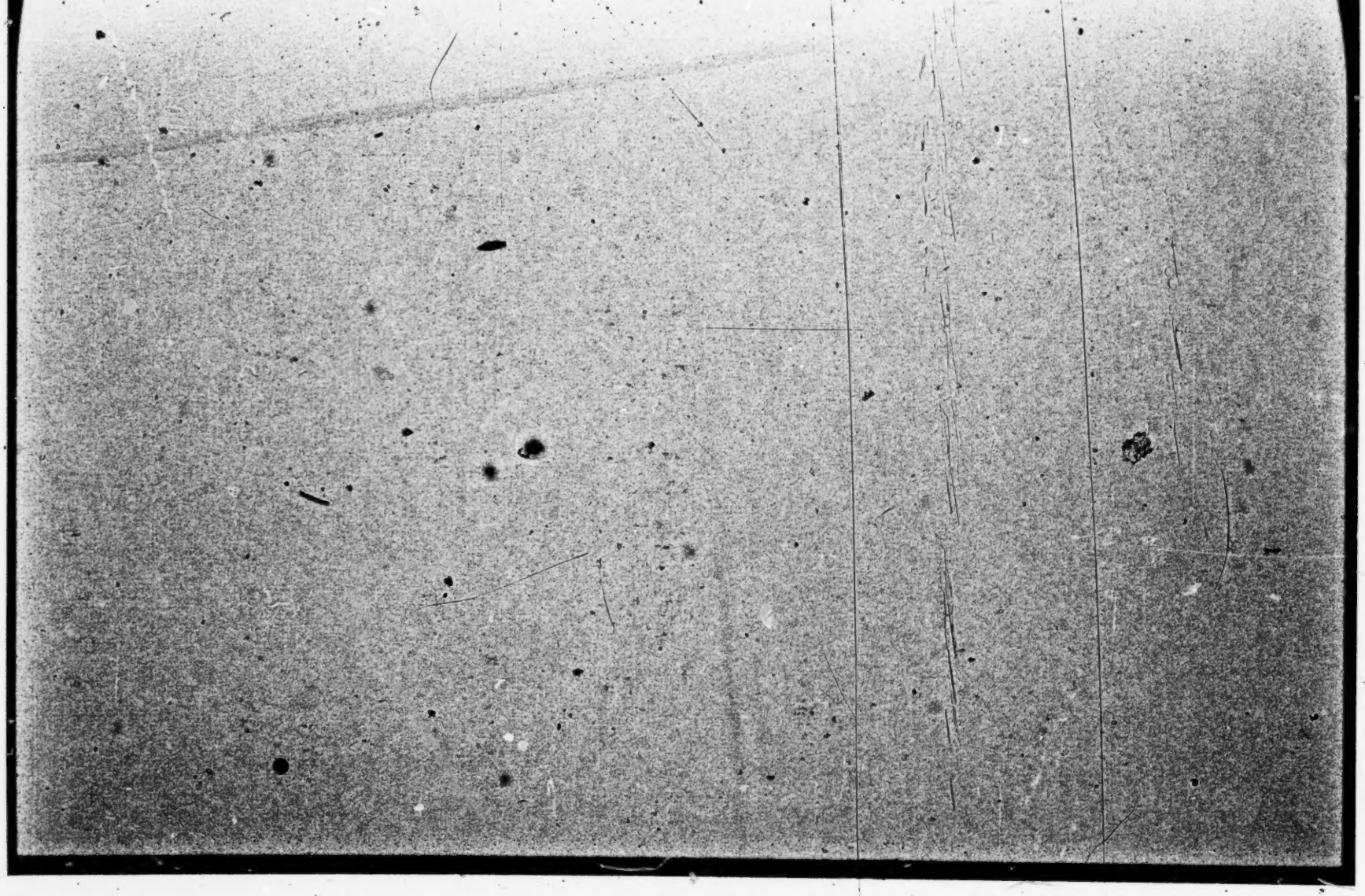

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FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Pikes Peak Broadcasting Company and Sangre De Cristo Broadcasting Corporation, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 24, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pages 1 to 25) is unreported. The Commission's Memorandum Opinion and Order, dated May 24, 1968, is reported at 12 FCC 2d 955 and reprinted in the Joint Appendix (J. A. 200-35 through 200-61).[1]

JURISDICTION

Judgment of affirmance was entered by the Court below on March 24, 1969. A motion for rehearing, and, alternatively, for rehearing in banc, was denied by order of May 2, 1969. The jurisdiction of this Court is invoked under 28. U S C § 1254(1).

QUESTIONS PRESENTED

1. Where the Federal Communications Commission, implementing its jurisdiction over CATV systems and acknowledging that substantial public interest questions can arise therefrom in the small television markets, adopts a rule (47 C F R § 1109) for determination of those questions on an *ad hoc* basis, may it deny, without hearing, substantial and timely petitions as "insufficient" without having established any standards of "sufficiency," *i.e.* the burden of production necessary to justify a hearing and the sort of information relevant in meeting that burden.

2. Whether the Court of Appeals was bound, in any event, to require the Commission to consider the applicability of regulations adopted subsequent to the Commission decision herein (but prior to that of the Court of Appeals) which reflect the agency's most recent expert public interest determinations concerning CATV operations in the small television markets.

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[1] "J.A." refers to the printed Joint Appendix in the Court below, duly certified to this Court.

STATUTES AND REGULATIONS

1. Pertinent to the Court's consideration of this case are Sections 307(b), 309(d) and 309(e) of the Communications Act of 1934, as amended (47 U S C § § 307(b) 309(d) and 309(e)), which are reprinted in Appendix B.

2. The pertinent regulations of the Federal Communications Commission are § § 74.1105, 74.1107 and 74.1109 (47 C F R § § 74.1105, 74.1107 and 74.1109), which are reprinted in Appendix C.

STATEMENT

Colorado Springs-Pueblo, Colorado, ranks 138 of the nation's 224 television markets. Its three operating VHF stations are each affiliated with a national television network. In addition, the market has a VHF educational channel applied for and three commercial UHF channel allocations as yet unapplied for. Its three stations serve, in addition to the two core cities, substantial rural populations in rugged mountainous terrain (frequently via translators) who are solely dependent upon the Colorado Springs-Pueblo stations for television service. However, it is the residents of the two core cities which represent the principal viewing (and, therefore, economic) base for the operation of the local stations.[2]

Vumore Video Corporation of Colorado, Inc., ("Vumore") gave notice[3] that it intended to operate a CATV system in Colorado Springs carrying, in addition to the three local stations, five Denver VHF stations which cannot now be viewed in Colorado Springs-

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[2] 61% of the persons who view the three local stations reside in El Paso and Pueblo counties in which Colorado Springs and Pueblo are located. 70% of the population of these two counties resides in their two core cities (J.A. 221).

[3] 47 C F R §1105.

Pueblo.[4] Three of these are affiliated with the national networks; a fourth is an independent station controlled by the Chicago Tribune; the fifth is Denver's educational station.

The Vumore system is designed for a capacity of twenty television channels plus fifteen FM signals. Vumore, in what it termed "phase II" of the CATV operation, committed itself to carriage of at least ten more television broadcast signals (plus fifteen FM signals) including additional Denver independent stations and independents from Los Angeles and San Francisco. It proposes, as well, at least four channels of originations to fill out its twenty-channel capacity.

Following procedures prescribed by the Commission,[5] petitioners, as licensees of television stations KRDO-TV, Colorado Springs, and KOAA-TV, Pueblo[6], filed timely objections to the proposed CATV services and submitted extensive economic studies in support thereof.[7] These

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[4] See App. A, p. 6, fn. 5.

[5] 47 C F R §1109.

[6] The market's third station, KKTV, Colorado Springs, (Garvey Communications, Inc.) intervened in the Court below supporting the petitioners.

[7] Petitioners did not object to carriage of the Denver educational station until such time as the local educational station is able to go on the air. Subsequent to the Vumore notice for Colorado Springs, Pueblo TV Power, Inc., (an intervenor below) gave notice that it would operate a CATV system in Pueblo to provide the same services on its twenty-channel system. Timely objections were made with respect thereto. The Commission refused petitioners' request to consolidate the two proposals and, apparently for reasons of its own administrative convenience, acted upon the Colorado Springs proposal alone. It has not yet acted on the Pueblo proposal.

studies pointed out that the introduction of the Denver stations (from the nation's 39th market) into the small Colorado Springs-Pueblo market: (1) would reduce, perhaps eliminate, the ability of the stations to continue to produce local and public service programming and local news now carried at substantial loss; (2) could result in a merger of the Denver and Colorado Springs-Pueblo television markets whereby advertisers and networks could reach *most of* the smaller market (but not the rural areas) through carriage of the Denver outlets via CATV, thus threatening the existence of one or more of the local stations; and (3) would certainly foreclose the development of any additional local stations on the UHF channels allocated by the Commission to Colorado Springs-Pueblo pursuant to Section 307(b) of the Act. In addition, it was pointed out that the CATV entrepreneur had announced extensive plans for program originations, thus providing, with television broadcast signals as the base, additional competition destructive of local services and a form of pay television. The same entrepreneur (controlled by RKO General), it was shown, has extensive CATV holdings throughout the region (looking toward service to 750,000 people) as well as extensive broadcast and CATV holdings nationally, thus providing a realistic financial base for pay television and presenting serious questions of concentration of control of media of mass communications, regionally and nationally.

Petitioners, therefore, asked the Commission to conduct a hearing, and to make public interest findings as to the effects of these CATV services upon local broadcast services, upon the development of additional local UHF services and upon Commission and Congressional policies relative to pay television and diversification of media of mass communications.

With one of its seven members absent, a divided Com-

mission (4-2) declined to do so.[8] A divided panel of the Court of Appeals (Chief Judge Bazelon, concurring in part and dissenting in part) affirmed. Despite "certain defects" in the Commission's opinion (App. A, p. 3), the Court held: "It is important to emphasize, and *perhaps decisive*,[9] that the Commission's judgment on all of these economic forecasts is a provisional one. . . ." (App. A, p. 13)

The Court stated that the Commission's authority "must include the power to correct *false starts* and to cut back CATV operations if more experience shows *that this policy best serves the public interest.*" (App. A, p. 14) The statutory or regulatory basis for such authority is not mentioned.[10]

After the case had been submitted to the Court of Appeals (but before its decision), the Commission, acting upon "more experience," proposed significant modifications in its CATV regulations,[11] which, as here perti-

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[8] Only two Commissioners adopted the Commission's opinion; the other two members of the majority "concurred in the result." Two Commissioners voted for an evidentiary hearing with Commissioner Cox issuing a dissenting opinion.

[9] Emphasis supplied throughout unless otherwise indicated.

[10] The assumption of the Court of Appeals that service, once instituted, can be terminated is contrary to the Commission's own policy determination: "Once entrenched, it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." *Second Report and Order*, 2 FCC 2d 725, 782 (1966), *Midwest Television Co.*, 15 FCC 2d 84 (1968).

[11] "Notice of Proposed Rule Making and Notice of Inquiry," 15 FCC 2d 417 (December 13, 1968). A copy of this Notice was filed with the Court by the Commission.

nent, would limit, without "retransmission consent," CATV systems in the smaller television markets to the carriage of three network stations, one independent and one educational station. Thus, if this subsequent public interest determination were applicable, Vumore could here carry only the Denver independent and educational stations plus the three Colorado Springs-Pueblo stations[12] – a result which petitioners made clear below[13] was satisfactory to them.

However, the Commission held, in thus modifying its approach to CATV regulation and contrary to the understanding of the Chief Judge below,[14] that it intended to "grandfather" all systems *authorized* prior to December 20, 1968, even though, as in Vumore's case, they were not, by that date, *operating.*[15]

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[12] While the December 13 Notice speaks in terms of predicted service and while the Denver stations place theoretical Grade B signals over Colorado Springs (but not Pueblo), the Court of Appeals held that the Denver signals are not actually viewable in Colorado Springs (App. A, p. 6, fn. 5). For purposes of the December 13 Notice, therefore, they are the same as "distant" signals.

[13] "Petition for Rehearing and Alternatively for Rehearing in Banc," April 7, 1969, p. 10.

[14] In concurring in part, the Chief Judge assumed these new standards would apply (App. A, p. 23) while the majority intimated no opinion on the question (App. A, p. 17, fn. 11). However, as pointed out by petitioners in seeking rehearing, the Commission's December 13 Notice makes clear that *the date of Vumore's authorization* (prior to December 20 albeit stayed by Court action) is crucial. See 15 FCC 2d at 438; para. 53; final sentence thereof.

[15] Throughout these proceedings, in recognition of the impracticality of rolling back services once instituted, Vumore has not been permitted to operate. Under Commission procedures, the (Cont'd)

Thus, absent relief, Vumore will be permitted to carry the five Denver stations, giving Colorado Springs more service than Denver itself, whereas the Pueblo system (with no color of authorization prior to December 20) will be limited by the December 13 action to carriage of only the Denver independent and educational stations.[16]

REASONS FOR GRANTING THE WRIT

I

This case presents important issues of substance and procedure under the Communications Act of 1934, as amended[17] and under the decisions of this Court in *Federal Communications Commission v. Sanders Bros,* 309 U.S. 470 (1940) and *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

"An important element of public interest and convenience affecting the issue of a license is the ability of the licensee *to render the best practicable service* to the community reached by his broadcasts." *Federal Communications Commission v. Sanders, Bros., supra* at 475. While this Court there made clear that financial loss to a

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[15] (Cont'd)
timely filing of objections under 47 CFR §74.1109 automatically stays a system's right to operate (47 CFR §74.1105(c)). Upon appeal of the Commission's decision, the Court below entered a judicial stay and has now ordered stay of its mandate pending filing of this petition.

[16] The Pueblo system, relying upon the decision of the Court below, is now urging the Commission to waive the December 13 determination and permit it to carry the same signals as Colorado Springs.

[17] 47 USC §151 *et seq.*

licensee is not, *per se*, a public interest concern, competition is a relevant factor to Commission responsibilities for:[18]

> "It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations – the existing and the proposed – will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that by a division of the field, both stations will be compelled to render inadequate service."

As this Court pointed out in *United States v. Southwestern Cable Co., supra* at 173 (footnote 38):

> " 'Congress and the people' have no particular interest in the success of any given broadcaster, *but if the failure of a station 'leaves the community with inferior service,' this becomes 'a matter of real and immediate public concern.'* "

As restated by the United States Court of Appeals for the District of Columbia Circuit,[19] following *Sanders Bros.*, "the question whether a station makes $5,000 or $10,000 or $50,000 is a matter in which the public has no interest *so long as service is not adversely affected* . . ." But:[20]

> ". . . When an existing licensee offers to prove that the economic effect of another station would be

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[18] *Federal Communications Commission v. Sanders Bros., supra* at 476.

[19] *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D. C. 346, 349, 258 F. 2d 440, 443 (1958).

[20] *Ibid.*

> *detrimental to the public interest*, the Commission should afford *an opportunity for presentation of such proof. . . .*"

It was, precisely, the potentially destructive effect *upon broadcast services* and, particularly, *local services* which led the Commission to assert jurisdiction over all CATV systems[21] and which led this Court to affirm that action.[22] As this Court noted:[23]

> "The Commission has been charged with broad responsibilities for the orderly development of an appropriate system *of local television broadcasting.* The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population."

The Court concluded that the Commission was correct in determining "that the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed."[24] The Court noted that among the Commission's *statutory obligations,* were the "creation of a system of local broadcasting stations" and the promotion of "significantly wider use . . . of the available ultra-high frequency channels [footnote omitted]."[25] Thus, the Court concluded that, while it was not then passing upon the validity of specific rules promulgated,[26] "the successful

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[21] *Second Report and Order, supra.*

[22] *United States v. Southwestern Cable Co., supra.*

[23] *Id.* at 177.

[24] *Id.* at 165.

[25] *Id.* at 174.

[26] *Id.* at 167.

performance of these duties demands *prompt and efficacious regulation* of community antenna television systems."[27]

In proceeding to regulate, the Commission established a procedural dichotomy: in the top 100 markets, it ordered that an evidentiary hearing would be *mandatory* to permit public interest findings on the effect of importing "distant" signals via CATV (47 CFR §74.1107). In the smaller markets, the Commission established procedures whereby stations would be notified of proposed CATV services (47 CFR §74.1105) and afforded the opportunity to bring public interest questions arising therefrom to the Commission's attention (47 CFR §74.1109) with an automatic stay being imposed upon the CATV operation pending Commission review (47 CFR §74.1105(c)).

The nation's top 100 television markets contain about 90% of the country's television homes.[28] Thus, the mandatory hearing procedure of 47 CFR 74.1107, which is applicable thereto, immediately saved the largest broadcasters and the networks from uncontrolled CATV intrusion. Some 241 television stations in 124 television markets below the top 100, competing, among them, for 10% of the national audience, were promised, as their single remedy, *ad hoc* scrutiny of CATV proposals as they arose.

Contrary to implications in the majority decision of the panel below,[29] the Commission did not make a finding in its *Second Report and Order* that CATV

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[27] *Id.* at 177.

[28] *Second Report and Order, supra* at 783.

[29] App. A, pp. 6, 8, 13, 17, 18.

operations in the smaller markets *were necessarily in the public interest,* but rather there acknowledged:[30]

> "We think, therefore, that a fair compromise is to draw the line as to special attention . . . at the 100th market, and below that point, simply to take *such action as may be necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention.*"

The Commission elaborated:[31]

> "Admittedly, *there can be substantial problems affecting the public interest* where the CATV system proposes to extend the signals of broadcast stations beyond the Grade B contour *into areas below the top 100 markets.*"

A majority of the Court below, ignoring these Commission findings, proceeded upon the erroneous assumption that CATV operations in the smaller markets were presumptively in the public interest and that petitioners were therefore seeking a "waiver" of that presumption. No such finding has ever been made by the Commission, and no such presumption exists.[32]

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[30] *Second Report and Order, supra,* at 783-4.

[31] *Id.* at 783.

[32] The title of 47 CFR §74.1109 must be read in its entirety. While it allows the filing of "petitions for waiver of the rules," such would normally come from CATV systems seeking relief, for example, from the mandatory hearing requirement of 47 CFR §74.1107. But 47 CFR §74.1109 also specifies procedures for rulings on "complaints and disputes" and 47 CFR §74.1109(f), following the Commission's *Second Report and Order* observations on small market problems, explicitly envisions evidentiary hearings.

As the Commission explained, the only difference between the top 100 and small market procedures is in the terms of burden of proof and proceeding:[33]

> "The *sole difference* is that the burden of proceeding and of proof lies on the CATV system in the case of distant signal proceedings under Section 74.1107(b) [the top 100 rule] and is *largely* on the petitioning broadcaster in a footnote 69 proceeding arising under Section 74.1107(d) and Section 74.1109 . . ." [the small market rule].

Differing divisions of the Court of Appeals below, considering specific actions by the Commission under these rules *on three different occasions*, warned that those actions were not readily comprehensible in light of overall Commission responsibilities and called for clarification of procedure and purpose.[34] Speaking directly to the absence of guidance for those attempting to invoke the procedures of 47 CFR §74.1109, a different division of the Court below held that, in the future, the Commission would be required "to make clear . . . the burden of proof it expects petitioners seeking an evidentiary hearing to meet."[35]

The threshold showing submitted by these petitioners "is the most substantial showing ever made in a case of this kind. . . . It stands substantially unimpaired despite

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[33] *Midwest Television, Inc.*, 13 FCC 2d 478, 489 (1968).

[34] *Channel 9 Syracuse, Inc. v. FCC*, 128 U. S. App. D. C. 187, 385 F. 2d 969 (1967); *Hubbard Broadcasting, Inc. v. FCC*, 128 U.S. App. D. C. 197, 385 F. 2d 979 (1967); and *Cedar Rapids Television Co. v. FCC*, 128 U.S. App. D. C. 270, 387 F.2d 228 (1967).

[35] *Cedar Rapids Television Co. v. FCC, supra* at 274, 232.

the majority's uncritical acceptance of the staff's efforts to undermine it."[36]

That observation was not denied by the Court below. But the majority would affirm, ignoring the strictures of other divisions of its Court and without insisting upon clarification of applicable standards, upon the premise that the Commission, with "more experience," retains the power to correct "false starts."

Having assumed CATV jurisdiction, it is incumbent upon the Commission to establish procedures that are not only commensurate with its responsibilities, but with due process as well. The establishment of procedures to ascertain the public interest is left to the Commission only so long as it observes the basic requirements designed for the protection of public interests. The statute under which the Commission operates prescribes fundamentals of fair play and requires that interested parties be afforded a *realistic opportunity for a hearing. Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).[37]

Where there is a threshold question of the need for hearings, there is also a requirement that the standards for a hearing be *clearly established, KGMO Radio-Television, Inc. v. Federal Communications Commission,* 119 U.S. App. D.C. 1, 366 F.2d 920 (1964), particularly where, as here, the Commission is entering into a new

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[36] Commissioner Cox, dissenting herein (J.A. 200-60, 61.)

[37] Petitioners here were never given the opportunity to respond to the Commission's *ex parte* disposition of their allegations and factual submissions in spite of the Commission's acknowledgment that the objections which it had to petitioners' submissions had not been previously articulated. (J.A. 200-41) Moreover, it is plain from the Act that the Congress intended to require the Commission to resolve "substantial and material questions of fact" through evidentiary hearing (47 USC §§309(d) and (e)).

field of regulation, *Cedar Rapids Television Co. v. Federal Communications Commission, supra.* Failure to establish clear standards results in a deprivation of due process. *L. B. Wilson, Inc. v. Federal Communications Commission,* 83 U.S. App. D.C. 176, 170 F. 2d 793 (1947).

Thus, whether the Commission may have given *some reasons* for denying petitioners' requests is not the question. Rather, it is whether petitioners have been deprived of due process by the Commission's failure to articulate the standards it expects petitioners to meet in demonstrating threshold or *prima facie* injury to the public interest.

Contrary to the majority opinion below the question is not whether, in this case, some sort of "path . . . followed [by the Commission] *can be discerned.*"[38] For, if necessary public interest inquiries are "halted at the threshold [so] that it is impossible to say whether or not . . . [statutory] standards have been applied, then . . . review has indeed become a perfunctory process."[39]

The proper question in CATV regulation, as recognized by another division of the Court below, is "whether what the Commission has done accords with entrenched standards by which administrative action is tested judicially."[40]

The result here is plainly inconsistent with the Commission's fundamental responsibilities as defined by this Court in 1940 (*Sanders Bros.*) and spelled out, again by

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[38] App. A, p. 17.

[39] *United States v. Carolina F. Carriers Corp.*, 315 U.S. 475, 489 (1942).

[40] *Indiana Broadcasting Corp. v. FCC*, ___ U.S. App. D.C. ___, 407 F. 2d 681, 692 (1968).

this Court, in 1968 (*Southwestern*). It leaves the fate of the small market television industry, and, more importantly, the public they serve, to agency actions which can be neither rationally reviewed nor judicially tested.

As observed by Chief Judge Bazelon (App. A, p. 20), "the decisions of the Commission in this area suggest that this may indeed be the intended message [*i.e.* that no relief will ever be accorded small market TV] – with the caveat that the FCC retains the right to grant a hearing when it pleases and for whatever unannounced reasons it pleases."

The lack of meaningful procedures cannot be reconciled with this Court's definition of the Commission's statutory responsibility to consider the effect, and make public interest findings on, its own actions where the public interest is threatened. Neither can the result be squared with "prompt and efficacious regulation" of CATV services envisioned by this Court in *Southwestern* a year ago.

II.

If, however, the Commission is to be permitted to proceed without definition of the standards necessary to invoke its processes on the premise that, as it accumulates "more experience," it will have the ability to correct what the Court below termed "false starts,"[41] then, surely, when it does make further and corrective public interest findings, those determinations must be made applicable to relevant CATV operations.

After this case was submitted to the Court below, the Commission, based upon experience accumulated since

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[41] App. A, p. 14.

1966, established new and different substantive procedures to govern the carriage of distant signals in small television markets.[42] In that action, while retaining the availability of the *ad hoc* procedures of 47 CFR §74.1109 for use by small market television stations seeking relief, the Commission also affirmatively determined that the public interest would be served by *limiting* CATV systems in markets below 100 to the carriage of stations providing the full services of the three television networks, one independent and one educational station without "retransmission consent." Under these substantive rules (made effective, as well, as interim guides), a system would be allowed to carry "distant" signals only to the extent that local stations *did not provide the specified services.* Since the local stations in Colorado Springs-Pueblo provide the full services of the three television networks, the Colorado Springs CATV system, in light of this public interest determination, should be limited to carriage of the Denver independent and educational stations plus the three Colorado Springs-Pueblo stations.

While the system could carry additional signals with "retransmission consent," the Commission made clear[43] that such consent would have to comprehend *ultimate programming rights.* Thus, the system would be required to bargain and pay for—as broadcast stations now do—

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[42] "Notice of Proposed Rule Making and Notice of Inquiry," 15 FCC 2d 417 (1968). We emphasize that 47 CFR §74.1109 was retained, without change, and the need for meaningful standards thereunder remains, under the new rules, as urgent as under the old.

[43] Order released January 17, 1969, in Docket No. 18397, ¶4 (FCC 69-54); not officially reported but reprinted in Pike and Fischer, *Radio Regulation,* "Current Service," Vol. 2, pp. cxxiv–cxxiv-a, and published, 34 F. R. 1177 (January 24, 1969).

the rights to carry any programming additional to that available from the permissible stations.

Petitioners made clear to the Court below that if this intervening public interest accommodation were made applicable to Colorado Springs (as it will be in Pueblo)—if, indeed, as envisioned by the Court below, the Commission would thus correct its "false start"—petitioners were satisfied that the major public interest problems arising from the earlier proposal had been obviated.

Thus, although the Court of Appeals found it "perhaps decisive" that the Commission could and should correct "false starts" in this emerging and rapidly developing field, *the Commission has not shown any inclination to do so.* Nor did the Court below *insist that it do so.*

Small market television stations, if this decision is permitted to stand, have no meaningful remedy on an *ad hoc* basis; nor, apparently, is the public in these areas to be benefited by subsequent rule making findings by the Commission.

In short, application to this case of the most recent public interest determinations dealing with smaller television markets will not be made absent relief from this Court.

CONCLUSION

To insure achievement of "prompt and efficacious" regulation of CATV services, the petition for writ of certiorari should be granted.

Alternatively, this Court should vacate the judgment of the Court of Appeals and remand the case for appropriate further consideration in light of the Commission's

current, applicable public interest findings in respect to CATV services appropriate for the nation's small television markets.

Respectfully submitted,

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Washington, D.C. 20036

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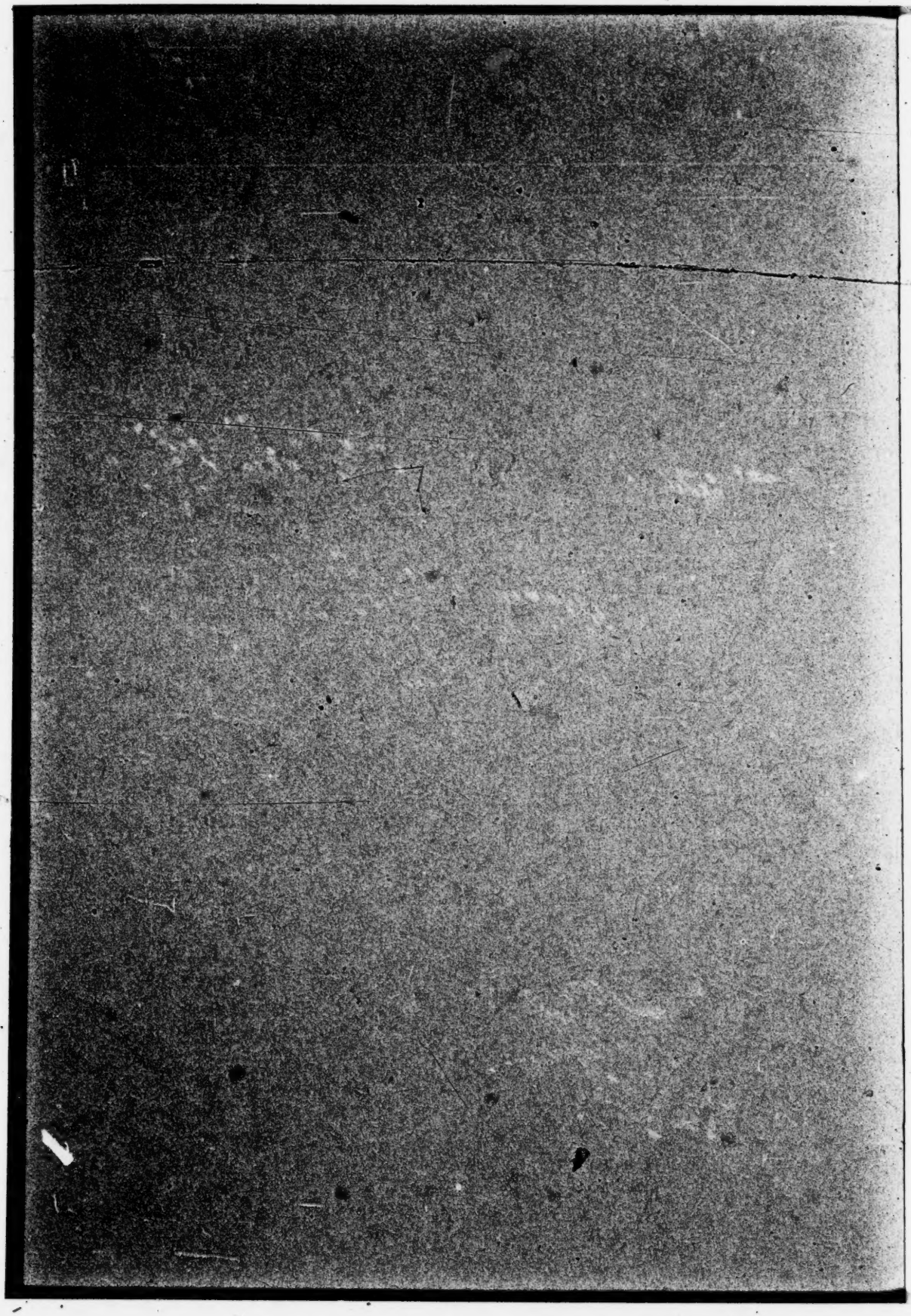

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,023

PIKES PEAK BROADCASTING COMPANY, Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents

CITY OF COLORADO SPRINGS, COLORADO, VUMORE VIDEO CORP. OF COLORADO, INC., GARVEY COMMUNICATIONS SYSTEMS, INC. NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL TV TRANSLATOR ASSOCIATION, COLORADO TRANSLATOR ASSOCIATION, ALL-CHANNEL TELEVISION SOCIETY, Intervenors

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No. 22,024

SANGRE DE CRISTO BROADCASTING CORPORATION, Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents

GARVEY COMMUNICATIONS SYSTEMS, INC., NATIONAL ASSOCIATION OF BROADCASTERS, VUMORE VIDEO CORP. OF COLORADO, INC., CITY OF COLORADO SPRINGS, COLORADO, NATIONAL TV TRANSLATOR ASSOCIATION, COLORADO TRANSLATOR ASSOCIATION, ALL-CHANNEL TELEVISION SOCIETY, PUEBLO TV POWER, Intervenors

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Petitions for Review of an Order of the Federal Communications Commission

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Decided March 24, 1969

Mr. Richard Hildreth, with whom *Mr. Wade H. Hargrove* was on the brief, for petitioner in No. 22,023.

Mr. Robert W. Coll, with whom *Messrs. James A. McKenna, Jr.*, *Vernon L. Wilkinson* and *Carl R. Ramey* were on the brief, for petitioner in No. 22,024.

Mr. John H. Conlin, Associate General Counsel, with whom *Messrs. Henry Geller*, General Counsel, *William L. Fishman*, Counsel, Federal Communications Commission, and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig*, Counsel, Federal Communications Commission, also entered an appearance for respondents.

Mr. Frederick T. Henry, with whom *Mr. C. Sherfy Jones* was on the brief, for intervenors, City of Colorado Springs, Colorado.

Mr. Alan Raywid, with whom *Messrs. John P. Cole, Jr.*, and *Roger E. Zylstra* were on the brief, for intervenor, Vumore Video Corp. of Colorado, Inc.

Mr. John B. Summers was on the brief for intervenor, National Association of Broadcasters.

Mr. Arthur Stambler was on the brief for intervenors, National TV Translator Association and Colorado Translator Association.

Messrs. Martin E. Firestone and *Michael Finkelstein* were on the brief for intervenor, All-Channel Television Society.

Messrs. Lee G. Lovett and *Joseph F. Hennessey* were on the brief for intervenor, Pueblo TV Power, Inc.

Mr. Howard F. Roycroft entered an appearance for intervenor, Garvey Communications Systems, Inc.

Before BAZELON, *Chief Judge*, TAMM and LEVENTHAL, *Circuit Judges*.

LEVENTHAL, *Circuit Judge*: Licensees of Colorado television stations in Colorado Springs (KRDO-TV) and Pueblo (KOAA-TV) have petitioned for review of an order of the

Federal Communications Commission authorizing Vumore Video Corporation of Colorado to commence operation of a community antenna television (CATV) system in Colorado Springs.[1] Vumore and other interested parties have intervened in these proceedings.[2] Despite certain defects in its opinion, we think the Commission's decision is supported by the record and should be affirmed.

The basic question presented by these petitions before the Commission was whether Vumore's proposed CATV

[1]Petitioners are Pikes Peak Broadcasting Company, licensee of Station KRDO-TV in Colorado Springs; Metropolitan Television Company, former licensee of Station KOAA-TV in Pueblo, Colorado; and Sangre de Cristo Broadcasting Corporation, Metropolitan's assignee. They petition under 47 U.S.C. § 402(a) for review of the Commission's decision and order in *Vumore Video Corp. of Colorado, Inc.*, 12 F.C.C.2d 955 (May 24, 1968).

[2]The City of Colorado Springs joined in Vumore's brief for affirmance of the Commission's decision. A separate brief for affirmance was filed by Pueblo T.V. Power, Inc., authorized to operate a CATV system in Pueblo. A joint brief for reversal was filed by the National Association of Broadcasters, the National TV Translator Association, the Colorado Translator Association, and the All-Channel Television Society. Garvey Communications Systems, Inc., licensee of Station KKTV-TV, Colorado Springs, filed a separate statement in support of the petitioners.

The Commission denied several requests to consolidate this proceeding with several other pending CATV proposals which would affect Denver and Pueblo. It denied the Denver request, stating that its policy was not to include petitions from smaller market stations with mandatory major market hearings. The microwave and CATV authorizations involving Pueblo were said to be at an early stage in the proceedings, and the Commission chose not to deny Vumore its right to expeditious consideration of its long pending notification. 47 C.F.R. 74.1109(f) (1968). The Commission further stated that much of the information submitted and examined in this proceeding related to both Colorado Springs and Pueblo. We note that the Coe-Saunders Report is a study of the Colorado Springs-Pueblo market and its conclusions apply to both cities. While the cumulative impact of multiple CATV operations in an area may in some cases call for consolidated proceedings, we think that the Commission has broad discretion to structure its own proceedings and gave adequate reasons for denying the requests for consolidation here.

service,[3] particularly the importation of Denver signals, posed a sufficient threat to the economic health of existing television stations or to potential development of UHF broadcasting in the Colorado Springs-Pueblo market to warrant or require holding an evidentiary hearing on those issues. Petitioners also requested that the issues of concentration of control of communications media and Vumore's plans for pay-TV be set for hearing. Petitioners claim error in the Commission's grant of authority in the absence of any such evidentiary hearing.

The Commission's response must be considered in the context of its broad regulatory program for CATV. The potentially injurious impact of CATV on the free television system through fragmenting audiences and revenues prompted the Commission's assertion of jurisdiction over cable as well as microwave CATV operations in its *Second Report and Order*, 2 F.C.C.2d 725 (1966), issued after extensive rule-making proceedings. In its decision affirming the Commission's jurisdiction, the Supreme Court agreed that prompt and effective regulation of CATV is a necessary correlative of the Commission's ". . . broad responsibilities for the orderly development of an appropriate system of local television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). See also *Buckeye Cablevision, Inc. v. FCC*, 128 U.S.App.D.C. 262, 387 F.2d 220 (1967).

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[3]On August 16, 1967, Vumore gave notice pursuant to 47 C.F.R. 74.1105 (1968) of its intention to establish a CATV system in Colorado Springs. Its proposed service includes carriage of two Colorado Springs stations, one Pueblo station, three Denver commercial stations with network affiliation, one Denver independent station, one Denver educational channel, and two channels of news, weather, and music selected from area FM radio stations. Petitioners objected only to the carriage of the Denver stations proposed in the notice, except for the educational channel. They acquiesce in the carriage of the Denver educational channel only until the Pueblo educational channel becomes operative.

The Commission determined in the *Second Report* that CATV did not pose the same threat to free television in all markets. Specifically, it decided that independent UHF stations or wire pay-TV based upon CATV operations are most likely to develop in the top 100 markets, and that, accordingly, further audience fragmentation in those markets through competition from outside stations could have serious consequences.

In the smaller markets, below top 100, the Commission judged that independent VHF or UHF stations are less likely to develop. Smaller markets are likely to be underserved, and there CATV will make a positive contribution by bringing in independent (non-network) programming not otherwise available.

The Commission also observed that smaller markets are likely to contain three or fewer network-affiliated stations. The significance of network affiliation lies in the fact that the Commission's carriage and non-duplication rules, requiring CATV carriage of local stations and providing substantial exclusivity for local network programming, will protect the local stations' audience for network programs and revenues from network sources, thus insuring the stations' continued viability. *Second Report and Order, supra* at 783.[4]

The Commission's applicable rules governing hearings on proposed CATV operations—as in effect at the time of this proceeding—reflect these judgments concerning the differences between major and smaller markets. CATV systems

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[4]The carriage and non-duplication rules were imposed upon CATV systems using microwave facilities in the *First Report and Order*, 30 F.C.C. 683 (1965). These rules were modified and extended to non-microwave CATV operations in the *Second Report and Order, supra*. The carriage rules require a CATV system to carry the signals of stations serving the community in which the system operates. The non-duplication rules prohibit CATV systems from duplicating the programs of the local stations on the same day. The effect of these rules is to maintain the local stations as exclusive outlets for most of their network programming.

proposing to operate within the Grade A contour of a television station located in a top 100 market cannot import distant signals[5] until the Commission makes a positive determination that importation of distant signals will be consistent with the public interest. 47 C.F.R. 74.1107(a) (1968). In general the rule contemplates that such determination for the top 100 markets will be made only after evidentiary hearing, though there is provision for waiver of hearing on appropriate petition. 47 C.F.R. 74.1109 (1968). In contrast, CATV systems proposing service in markets below top 100 are generally free to proceed, after notice to local stations, without awaiting a hearing. This is subject to the possibility that the Commission may grant a petition from an affected broadcast station for special relief under the waiver rule,—both for relief on the merits to halt or condition the operation of the CATV system, and for ancillary procedural protection, giving petitioner an opportunity to be heard before the CATV system is given authority to proceed. 47 C.F.R. 74.1107(c) (1968). The petitioner must state facts sufficient to show that relief is needed and

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[5]The Commission has defined the term "distant signal" as a signal "which is extended or received beyond the Grade B contour of that station." 47 C.F.R. 74.1101(i) (1968). The carriage rules require CATV systems to transmit to their subscribers Grade B signals reaching their service area. The chief purpose of the CATV hearing rules is to permit assessment of the need for restrictions on CATV importation of signals not reaching the system's service area at all. The predicted Grade B contour of the Denver signals reaches Colorado Springs, but not Pueblo. Some argument has ensued over whether petitioner Pikes Peak is entitled to object to the importation of the non-distant Denver signals. We think that the record adequately shows that the Denver stations are not in fact generally viewable in Colorado Springs due to transmission problems over the rugged terrain. The Commission has recognized that there may be situations where CATV importation of non-distant signals will affect viewer patterns and threaten substantial audience fractionalization. *Second Report and Order, supra* at 786, n. 69. There would be no dispute and probably no CATV proposal either if Denver stations were already widely viewable in this market, and we see little point in the Commission's extended quibble over this question.

would serve the public interest. The Commission may make its determination of the public interest issues on the pleadings, or it may specify other procedures such as oral argument, evidentiary hearing, or further written submissions as appear appropriate. 47 C.F.R. 74.1109 (1968).

Petitioners do not challenge the Commission's 100 major market distinction and the procedural differences based on it. They carry the burden, therefore, of showing that the Colorado Springs-Pueblo television market, ranked 138th, does not conform to the pattern of below top 100 markets described by the Commission, and of demonstrating that the presumption, reflected in the rules, that importation of Denver signals is in the public interest has been sufficiently negatived by the showing in their papers to require an evidentiary hearing.

In support of their contention that the Colorado Springs-Pueblo market requires an exception from the general CATV rules for markets under the top 100, petitioners sought to show (1) that this market is likely to support an independent UHF station within the reasonably foreseeable future and (2) that the carriage and non-duplication rules providing exclusivity for local network programming will not adequately protect the three existing network-affiliated stations from losses due to CATV.

In support of these two economic arguments, petitioners submitted a report entitled *An Analysis of the Colorado Springs-Pueblo Television Market: Its History, Status and Future,* prepared by Dr. James L. Saunders and Robert L. Coe, of the Center for Research on Broadcast Management and Economics, School of Communications, Ohio University. In rejecting the conclusions of the Coe-Saunders Report, the Commission was not required to reiterate the general findings of its *Second Report* underlying the conclusion that, in general, introduction of CATV serves the public interest in smaller markets. It was called upon to make a considered disposition of the claim that the Coe-Saunders Report warranted an exception to its smaller

market rule or at least raised questions sufficient to require an evidentiary hearing.

The Commission's disposition of the central economic issues here is marred by small and sometimes mistaken criticisms of the Coe-Saunders Report. However, it serves little purpose to remand a case for correction or clarification of subsidiary matters not central to an agency decision when, as here, the decision is accompanied by findings and analyses supported by the record against the background of the *Second Report* and sufficient to show that the result is reasonable and in conformance with the statute and regulations. *Braniff Airways, Inc. v. CAB*, 126 U.S.App.D.C. 399, 379 F.2d 453 (1967). We consider petitioners' contentions seriatim.

1. Potential for UHF Development

Petitioners argue that, contrary to the Commission's negative view of prospects for independent UHF stations in smaller markets, the Colorado Springs-Pueblo market will be able to support an independent UHF channel by 1972, unless CATV service is introduced. We have given special attention to this argument, because if a real possibility of UHF now exists, it will almost surely be foreclosed by CATV for the foreseeable future.[6] The Commission was justified, we think, in doubting UHF development in this market and in concluding that carriage of the Denver independent station and others by CATV was the more promising way to broaden service to the community.

The Commission stated that, despite petitioners' attempted showing of conditions favorable to UHF, there had been no applications for the UHF assignment and no indications that any would be filed. Its judgment was informed by

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[6] The judgment on potential for UHF development also merits special examination because it appears to be the main point of disagreement between the majority opinion and the dissent of Commissioner Cox.

experience with UHF operations and applications.[7] Moreover, there are significant weaknesses appearing on the face of the Coe-Saunders case for the likelihood of UHF development. The Report states that television revenues of $3,000,000 will be necessary to support an independent station by 1972, but its own prediction of 1972 revenues is only $2,500,000. The Report then concludes that the $500,000 difference is "present" because current television revenue per home in the market is below average and "the Colorado Springs-Pueblo area might well produce more." (Appendix I, Exhibit G, 288). The Report offers no substantial support for this optimistic forecast. It also states that the market stations have had an unusually high expense-revenue ratio, a factor which would seem to make the picture still more dismal. A favorable inference might have been drawn if the Report had set forth facts to provide a basis for predicting that there would be a change in conditions, and that income per TV home would increase or the expense-revenue ratio would decline; but no such facts were offered. There is no basis in the abstract to suppose that conditions in the Colorado Springs-Pueblo market will change. An average is a combination of highs and lows. The fact that a market area has been on the low side of the national average in the past is not of itself a basis for predicting it will be on the high side in the future. If anything, it would seem more reasonable to project that it will stay below average unless there are facts portending a change in conditions.

The Report does observe that a new station itself generates additional revenues, but this prospect would hardly be adequate incentive for investment in a new station under otherwise unfavorable conditions. The Commission did not act unreasonably in rejecting as inadequate a proffer of a prediction of UHF development that was supported by only such speculative contingencies.

[7]The smallest market in which a UHF station competes with three VHF stations is presently Lynchburg-Roanoke, Virginia, a market with more than three times the number of television households in the Colorado Springs-Pueblo market.

2. Economic Injury to Existing VHF Stations

Since a decline in audience portends a decline in advertising revenues, the estimate of the amount of revenue of broadcast stations that will be dried up by CATV depends upon the estimate of the degree of CATV penetration (number of subscribers) and the level of viewer defection to stations brought into the market via CATV. Stated simply, petitioners' argument is that CATV penetration in the Colorado Springs-Pueblo market will be substantial and that the protection from viewer defection afforded to their network programming by the non-duplication rules will not prevent serious economic loss. They allege (a) that audience fragmentation by CATV will result in substantial revenue losses in their market and (b) that they will be forced into competition with the larger Denver stations in procuring independent (syndicated and feature film) programming sold on a market exclusivity basis when the Denver stations command a substantial viewing audience in the Colorado Springs-Pueblo market. They conclude that predicted losses will necessarily result in curtailment of their high-cost local and public affairs programming, contrary to the public interest.

(a) *Projection of losses due to audience fragmentation*

The Commission recognized that the introduction of CATV would have an economic impact on the local stations, but concluded that this would not be sufficient to threaten their viability. This judgment finds support in the record. First, the Coe-Saunders Report shows on its face that the protection afforded in this market to the stations' audiences and revenues by the non-duplication rule is as great or greater than the protection generally contemplated for smaller market stations in the *Second Report*. The Report states that television stations in the Colorado Springs-Pueblo market receive a comparatively high percentage of their revenues from network sources (22% as compared to a general 16.6% average), and that network revenues

are growing at rates above the norm. In addition, spot advertising adjacent to network programs accounts for 23% of Station KRDO's non-network revenues and 33.5% of Station KOAA's non-network revenues. Thus, revenues for these two stations in the range of 40-50% are derived from programming protected by the non-duplication rule.

The Coe-Saunders Report also states that 36.6% of the local stations' revenue is from local advertisers, while the average from this source is 23.7%. Petitioners contend that national and regional advertisers will be able to turn to Denver stations to reach part of the Colorado Springs-Pueblo market if Denver CATV channels attain high ratings there. This may develop in the future, but it would seem unlikely that local advertisers would be willing to pay higher Denver rates for the relatively small portion of the market audience they wish to reach. A substantial portion of local advertising revenues is likely to remain oriented to the local television stations.

In its analysis of the Coe-Saunders Report, the Commission pointed out errors in calculations which overstated the extent of the losses projected for petitioners. For example, Table III, Exhibit H of the Report, showing losses at varying levels of CATV penetration and viewer defection, is based on a market of 90,000 TV homes, the total for the two-county area. However, as the dissenting Commissioner concedes, the CATV systems whose impact is analyzed in the Report will operate only in the core cities of Colorado Springs and Pueblo, containing only about 60,000 TV homes. Retaining the assumption of the Coe-Saunders Report of a minimum of 25% CATV penetration and 30% viewer defection, but making a downward adjustment from 90,000 to 60,000 homes, the calculated loss of some $123,000 would recalculate at approximately $82,000. Other problems in the Coe-Saunders projections make it

likely that even the adjusted figure is a high-pitched estimate of losses due to CATV.[8]

The Commission's conclusion on the economic injury issue is also supported by a different, perhaps an alternative ground. The Commission held that the general increases in television advertising revenues in the market projected in the Coe-Saunders Report itself would be sufficient to protect the viability of the local stations. Exhibit G of that Report states that television revenues in the Colorado Springs-Pueblo market can be expected to increase at the rate of at least $100,000 per year. This forecast is based upon general growth factors such as increases in population, number of TV homes, income per household, and retail sales. (Appendix II, Exhibit G, 282-84.) While these projected increases in market revenues would have to be adjusted for the impact of CATV, including the possibility of lower advertising rates, they certainly cushion against a sharp absolute decline in revenues for the local stations.[9]

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[8] For example, the Coe-Saunders estimates of viewer defection are based on an analysis of the impact of CATV in the Bakersfield, California television market. As petitioner Pikes Peak Broadcasting Company concedes in its reply brief (at 25), the Bakersfield system imported the signals of three independent Los Angeles stations as well as the network affiliates. The non-duplication rules afford no protection to local stations from competition from independent stations. Here, however, the CATV system proposes to bring in only one Denver independent station, which presages a lower rate of defection in the Colorado Springs-Pueblo market.

In its main brief, Petitioner Pikes Peak estimates a higher minimum loss, basing its projection on 60% CATV penetration instead of the Coe-Saunders estimate of 25%. The support of record for this estimate is a statement that according to a trade periodical, one of Vumore's principals was reported to have said that Vumore anticipated 60% saturation in Colorado Springs in seven years. (Appendix I, 92) This court does not propose to choose among these conflicting forecasts. It suffices to say that some reasonably clear and substantiated estimate of losses was required to meet petitioners' burden under the rules, and we do not find that kind of showing in the papers before us.

[9] The agency was not required to accept the apparent assumption of Commissioner Cox, in dissent, that the introduction of CATV will drai

We think the Commission's conclusion that the stations would remain financially viable is supported in the record and is not lacking in reasoned judgment. There was no need for the Commission to accord an evidentiary hearing to give petitioners an opportunity to develop evidence when the proffer, even if confirmed by testimony in the hearing room, was not sufficient in the Commission's view to establish a need for an exception from its general findings and policy for CATV in smaller markets.

(b) *Problem of competition with Denver stations*

The argument that the Colorado Springs-Pueblo stations will be forced to bid against Denver stations for syndicated programming sold on a market exclusivity basis assumes very substantial shifts in viewing patterns, tending over the long run to merge the Denver and local markets. Petitioners could not be expected to provide detailed factual support for this allegation. At the same time, it is doubtful that this argument could be further substantiated in an evidentiary hearing. We think the Commission could reasonably reserve judgment on a forecast looking so far into the future.

(c) *Reasonableness of Commission's judgment in view of its option to reconsider and provide future protective relief upon a showing of actual injury.*

It is important to emphasize, and perhaps decisive, that the Commission's judgment on all of these economic forecasts is a provisional one, subject to modification if the

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off all benefit from general increases in market advertising revenues. It seems doubtful that declines in rates for advertising would be so drastic as to exceed significantly any increases in advertising dollars that go into television. Increases in population and television homes would help to stabilize the stations' audiences. It seems likely that local TV advertisers will remain oriented to local media and will not regard other media as fully satisfactory substitutes for television advertising. Assuming local advertising expenditures increase and the supply of air-time remains limited with only three local broadcast stations, there would be mitigation of any sharp reduction in advertising rates.

viability of the existing stations is in fact impaired by CATV. The CATV rules, including the different hearing requirements and burdens allocated to CATV and the stations in major and smaller markets, are intended to accommodate the benefits of CATV and the legitimate claims of local broadcasting to protection for its vital public service function. As the Second Circuit observed in sustaining the Commission's regulation of pre-sunrise radio broadcasting, ". . . we cannot fault the Commission for believing a compromise between these competing claims constitutes the best solution. If experience should show the particular compromise here adopted to be less beneficial than the Commission believes, the road to change is always open." *WBEN, Inc. v. United States*, 396 F.2d 601, 614, *cert. denied*, 393 U.S. 914 (1968).

We think that petitioners have not met the burden of showing a likelihood that their viability will be imperiled, with consequent dilution of public service. Experience may reveal that the protection afforded to smaller market stations by the carriage and non-duplication rules is too little and the burden of showing special injury too great, but it is too soon to say the Commission struck a bad balance. We need only add that the public interest in maintaining free and local television service to both urban and rural viewers is more than sufficient to justify extraordinary remedies should they later be required. CATV operators must recognize, as Vumore's counsel conceded before this court, that they have no vested right to transmit a maximum number of signals to an unlimited number of subscribers if local broadcasting is jeopardized. The Commission's authority over CATV operations extends to whatever is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co., supra*, 392 U.S. at 178. This must include the power to correct false starts and to cut back CATV operations if more experience shows this policy best serves the public interest. If developments in the Colorado Springs-

Pueblo market confirm petitioners' dour predictions, they are free to seek further relief based on a factual showing of injury. *Second Report and Order, supra,* Para. 150 at 786.[10] Cf. *Permian Basin Area Rate Cases,* 390 U.S. 747, 764 and 770-71 (1968).

3. Concentration of Control of Communications Media

Petitioners allege that Vumore, its stockholders and principals, own numerous other CATV systems, microwave systems, and television stations in the country, and urge that the Commission hold a hearing on the issue of concentration of control of communications media. The Commission has the question of CATV cross-ownership under study in a rulemaking proceeding, *Notice of Inquiry in Docket No. 17,371,* 7 F.C.C.2d 853 (1967). We think it was within their discretion to decline to set the matter for earlier consideration in an adjudicatory hearing related to a particular market area. There are now no rules limiting ownership of CATV facilities by persons with other media interests. With program origination by CATV in an early stage of development, the need for rules to preserve diverse ownership of independent voices of opinion has perhaps been less pressing. Of course, the CATV system will increase the number of independent sources of information in the Colorado Springs-Pueblo community. The Commission also observed that Vumore's cross-ownership of media is not in the same market.

We agree with petitioners that the issue of concentration of control is important, and calls for prompt Commission

[10]The Commission stated its position as follows: "As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing." *Second Report and Order, supra* at 786.

action. However, we cannot expect instant regulation of all aspects of this complex and dynamic industry. The Commission should be afforded some time to develop a general policy enforced by rules. It will be able to remedy undue concentration of control if it occurs in the interim by retroactive adjustments, provided they are reasonable. *Niagara Mohawk Power Corp. v. FPC*, 126 U.S.App.D.C. 376, 379 F.2d 153 (1967). CATV systems are on notice that subsequent rules on multiple ownership may affect them. *Midwest Television, Inc. (KFMB-TV)*, 13 F.C.C.2d 478 (1968), Para. 67 at 508. The prospect of future regulation in this new industry is the price of getting underway now.

4. PROSPECT AND IMPACT OF CATV SERVICE OTHER THAN THE RELAY OF THE SIGNALS OF BROADCAST STATIONS: PAY-TV AND PROGRAM ORIGINATION

Petitioners also requested that the Commission consider at a hearing Vumore's plans for program origination and pay-TV, a standard issue in major market CATV proceedings. The Commission observed that pay-TV on a per-program basis is prohibited by the terms of Vumore's franchise from the City of Colorado Springs. This prohibition does not, however, forbid purchase of programs and closed circuit transmission on vacant CATV channels at an additional charge to subscribers.

The development of pay-TV or potential competition from CATV program origination, with or without an identified extra charge, cannot be dismissed as mere speculation in this market. However, consideration of Vumore's plans for service other than the relay of broadcast signals is not essential to a decision to allow the importation of Denver signals. Vumore's venture does not appear to be conditioned upon offering extensive closed-circuit services, and such services pose no immediate threat to the local stations. We think, therefore, that it was within the Commission's discretion to reserve these questions for future rulemaking or petitions for special relief if and when these services take

shape and adversely affect local broadcasting. See *Midwest Television, Inc. (KFMB-TV), supra,* Para. 67 at 508.

Subsequent to the preparation of this opinion and prior to its release, the Commission issued and called to our attention a notice of proposed rule-making that significantly concerns CATV and is addressed, *inter alia,* to such subjects as multiple ownership of CATV systems and CATV potential for program origination and pay-TV. *Notice of Proposed Rulemaking in Docket No. 18,397,* FCC Release No. 68-1176 (December 13, 1968). We cannot anticipate the ultimate form or effect of the proposed rules. However, the Commission's action dramatizes the fact that CATV regulation is in a state of flux and revision and confirms our judgment that it is not reasonable to require the Commission to spell out premature solutions to all problems prior to the authorization of any CATV service in smaller markets.

Putting to one side the possibility that rule changes may have a substantial bearing on the kind of case before us,[11] we hold as to this case that petitioners have not shown that the regulations in effect were arbitrarily applied because the Commission failed to shed new light on the standards for a showing sufficient to require an evidentiary hearing. The standard would perhaps have become sharper had the Commission focused upon clearer rebuttal of petitioners' central allegations. But this court's province in reviewing an agency decision is to see whether "the path which it followed can be discerned." *Colorado Interstate Co. v. FPC,* 324 U.S. 581, 595 (1945). We fairly discern from the opinion as a whole the Commission's view that the conclusions of the Coe-Saunders Report, discounted by its inflated inferences, and judged against the background of the *Second Report,* fall short of establishing a probability that UHF develop-

[11] We have, of course, decided this case on the record and regulations before us. We intimate no opinion on whether or to what extent changes in the rules would affect the rights of the parties in further or different proceedings before the Commission.

ment is likely in the Colorado Springs-Pueblo market and that the viability of local broadcasting will be jeopardized by CATV.

The presumptions reflected in the CATV regulations and procedures established for smaller markets are themselves only predictions, but educated guesses are a necessary part of the Commission's job. "It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience." *American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633 (*en banc*) (1966), *cert. denied*, 385 U.S. 843 (1966). We are satisfied that the Commission gave petitioners' predictions a hard look. We are assured that if events in Colorado Springs prove the Commission wrong, petitioners will have recourse to the Commission upon a showing of actual injury for such protection as may be appropriate upon a balancing of all interests, including the public's.

Affirmed.

BAZELON, *Chief Judge, concurring in part and dissenting in part:* Two aspects of this case trouble me. The first is the continued failure of the FCC to clarify the standards which govern the decision to hold an evidentiary hearing in a market below the top 100. The second is the cavalier refusal of the FCC to consider the issue of cross ownership on the unelaborated ground that the issue is currently under study by the Commission in a rule-making proceeding.

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Cedar Rapids Television Co. v. FCC, ___ U.S.App.D.C. ___, 387 F.2d 228 (1967), also involved a refusal by the Commission to hold an evidentiary hearing concerning the importation of a distant signal into a market outside the "Grade A" contour of a television station located in the top 100 markets. Since the petitioners there had failed to produce any documentation to show that UHF develop-

ment might be deterred by the CATV operation or that existing service might be threatened, we affirmed the denial. However, after agreeing with the "Commission . . . that if hearings were required on the sort of 'bare-bone' petition filed here, then hearings would almost always be required," we observed,

> Perhaps the paucity of information explains the Commission's failure to make clear in its memorandum opinion the burden of proof it expects petitioners seeking an evidentiary hearing to meet. Although the record in this case is such as to make it pointless to remand for a fuller explanation, we think it necessary to remind the Commission that particularly when, as here, it embarks into a new area of regulation, there is a special need for a fuller statement of its reasons.

Id. at ___, 387 F.2d at 387.

Several months later, in *Eastern Microwave, Inc.*, 11 F.C.C.2d 146 (1967), the Commission held that the petitioner had failed to bear "the initial burden of establishing the existence of special circumstances which would warrant a hearing." *Id.* at 147. Apparently attempting to meet the strictures of *Cedar Rapids,* the Commission elaborated its reasons:

> [The petitioner] has failed to supply any specifics, by affidavit or otherwise, regarding its financial condition, the impact that the present CATV system has on its operation, the impact that the proposed additional signals would have, or the manner in which the present or proposed CATV operation relates adversely to Brockway's operation to the detriment of the viewing public.

In this case, unlike *Cedar Rapids* and *Eastern Microwave,* the Commission can hardly argue that no documentation was submitted for the petitioners' claims that the proposed CATV operation would reduce the likelihood of an independent UHF station and threaten the viability of existing stations. Instead, the Commission examines the exhaustive *Coe-Saunders* report and other material submitted by the petitioners, criticizes various aspects of it, and concludes (1)

"our analysis of this market indicated no likelihood of UHF activation in at least the near future," and (2) "it does not appear that the potential impact [of the CATV system] would be sufficient to threaten the viability of existing or potential stations." Consequently, the Commission decides that the petitioners have "failed to establish special circumstances which would justify grant of the special relief it has requested."

This refusal to grant "special relief" confounds the separate questions of whether the importation of distant signals should be prohibited and whether the petitioners are entitled to a hearing on that issue. Insofar as the former question is concerned, I would agree that the petitioners have not demonstrated their case. The appearance of an independent UHF station does appear speculative; the probability of such economic harm as would threaten the viability of the present VHF station seems low.

But surely this cannot be the standard which must also be met for a hearing. To impose a requirement that the petitioners must prove by a preponderance of the evidence the case for non-importation of distant signals in order to be entitled to the evidentiary hearing which they seek in order to demonstrate the case against importation of signals would be a bizarre and circumlocutous way of announcing there never shall be any hearings in these markets.

Of course, the decisions of the Commission in this area suggest that this may indeed be the intended message—with the caveat that the FCC retains the right to grant a hearing when it pleases and for whatever unannounced reasons it pleases. In denying a hearing in this case, the Commission contributed only this analysis of the standards which determine the need for a hearing:

> [A]bsent a special showing made pursuant to Section 74.1109 of the Rules, there is no need for prior evidentiary hearing before CATV service may be instituted in below top-100 markets.

This case, like the previous cases in which the FCC has denied a hearing in such cases, gives little or no suggestion

what constitutes a "special showing." Nor do those cases in which the Commission has granted a hearing. *Taft Broadcasting Company*, 5 F.C.C.2d 746 (1966), involved the Lexington, Kentucky, market, which ranks 141st, three notches lower than the Colorado Springs-Pueblo market. The Commission held:

> In view of the nature of the Lexington market, its present UHF activity, and the facts set forth in the pleadings, a substantial question is raised as to the impact of the CATV systems upon UHF development. We will explore this question in a hearing.

Id. at 747.

Aside from a pending application for an educational UHF station in Lexington at the time of the decision, there seems little to distinguish that case from the present one. Certainly a "substantial question" has been raised here. And in *Taft Broadcasting*, the Commission seemed content with "the facts set forth in the pleadings"—a strange departure from the disdain with which it has viewed pleading allegations unsupported by evidentiary documentation in other cases.

United Transmission, Inc., 6 F.C.C.2d 786 (1967), involved several communities in Kansas, none of which were in a top-100 market. Two existing stations alleged that the proposed CATV systems would threaten their viability. The Commission decided that a hearing was necessary:

> As is frequently the case in economic impact cases, KSN's underlying assumptions leave lingering doubts, such as: Whether only the "net KCKT grade B area" is the proper measure of KCKT's circulation or profitability; whether KSN's accounting allocations are correct; and whether—in this market—KSN's estimates of the cost of CATV competition are realistic, particularly since KCKT is a semisatellite. But whatever our final decision, KSN's allegations and supporting documentation evoke sufficient concern to require evidentiary hearing. . . .

Id. at 787.

Of course, in this case it was just such "lingering doubts" concerning the validity of the petitioners accounting allocations and cost estimates which the Commission advanced to justify the refusal of relief.

The majority opinion of this Court, in examining the potential for UHF development in the Colorado Springs-Pueblo market, seems as uninterested as the Commission in treating separately the merits of the petitioners' case and the need for a hearing. The same is true concerning the issue of economic injury to existing VHF stations, except that the majority makes the alternative argument that no hearing was necessary since the allegations of the petitioners, even if true, were not sufficient to demonstrate a threat to their viability. The majority reaches this result by (correctly) recalculating the *minimum* estimated loss from CATV competition downward from $123,000 to $82,000 and suggesting that the estimated $100,000 annual increase in advertising revenue in the market would cover this loss easily.

But the *Coe-Saunders* report submitted by the petitioners provided a variety of loss estimates. While the minimum was $123,000, the maximum was $687,000. Adjusting this latter figure downward to correct for the error in the report concerning the number of households affected produces a maximum loss estimate of $458,000. Since the estimated growth in advertising revenues would hardly match losses of this magnitude, it is hardly accurate to argue that the petitioners' claims did not, even if believed, demonstrate a threat to their viability.

Whenever a hearing is denied, the Commission points out to this Court the cost and delay of hearings and the number of petitions with which it must deal. I sympathize with its plight. I also sympathize, however, with the petitioners in this and other cases who take the Commission at its repeated word that there are "special circumstances" that will justify a hearing. It does not seem impossible to demand of the FCC that it tell present and potential peti-

tioners, as well as this Court, just what those "special circumstances" might be.

An evidentiary hearing involves cost and delay. But so does a protracted administrative proceedings and appeal to decide whether a hearing is necessary. The FCC might well reduce its often-complained of workload by announcing with greater particularity the standards which govern the decision to grant a hearing, and thereby perhaps reducing the number of cases such as this where both the petitioners and the Commission have devoted considerable time and effort to the question of whether a hearing is necessary.

Normally, I would vote for a remand in this case in order for the FCC to answer such questions as the burden of production a petitioner must bear to justify a hearing and the sort of information relevant in meeting that burden. However, the notice of proposed rulemaking issued by the Commission after oral argument in this case indicates that substantially different standards are contemplated for the importation of distant signals into below top-100 markets. *Notice of Proposed Rulemaking in Docket No. 18,397*, FCC Release No. 68-1176, Paras. 55-58 (December 13, 1968). Since the CATV systems involved in this case have not yet begun operation because of the July 3, 1968, order of this Court staying the authorization granted by the Commission, they will be subject to these new rules. *Id.* at Para. 59. Consequently, I can see no utility to a remand in this case for a clarification of hearing standards under the old rules.

II

The Commission refused to consider the issue of multiple ownership of CATV systems in this proceeding because "the Commission retains adequate authority to deal with the question should action later appear desirable." The majority opinion accepts this representation, noting that the proposed rulemaking proceeding referred to in the preceding paragraph will also deal with the issue of multiple ownership.

I agree with the majority that "it is not reasonable to require the Commission to spell out premature solutions to all problems prior to the authorization of any CATV service in smaller markets." But, on the other hand, neither is it reasonable to disregard completely whether any new rules dealing with multiple ownership can or will in fact be applied to the market involved in this case.

In the section of its notice of proposed rulemaking dealing with multiple and cross ownership, the Commission states, "We stress that no grandfathering is contemplated, although consideration will be given to the question of affording an appropriate period within which compliance . . . is to be achieved." *Id.* at Para. 23.

My enthusiasm for this declaration of good intentions is tempered by the fact that the Commission has stated flatly in those sections of its notice dealing with importation of signals into both top-100 and below top-100 markets that any new rules will be applicable to CATV systems not yet in operation. *Id.* at Paras. 52, 59. If such explicitness is possible in those areas, why not in the areas of cross and multiple ownership?

The specter of grandfathering is hardly illusory. In the area of signal importation, the notice of proposed rule-making does provide that CATV systems already in operation will not be affected by the new rules "in view of the general impracticability or rolling back established service." *Id.; see also, Second Report and Order,* 2 F.C.C.2d 725, 782 (1966).

Perhaps diversification of ownership is more easily ordered than a rollback of established service. *But cf. Community Broadcasting Co. v. FCC;* 107 U.S.App.D.C. 95, 101, 274 F.2d 753, 759 (1960). But our experience with the problem of grandfathering in the communications industry has been such that I am unwilling to accept blithely the Commission's assurances of good intentions. Since there is no explicit provision against grandfathering in the part of the notice of proposed rule-making dealing with concentra-

tion of media ownership. I would remand this case to the Commission for a more complete statement of precisely the "adequate authority" it retains to deal with the problem in the Colorado Springs-Pueblo market. *Cf. United Transmission, Inc.*, 10 F.C.C. 118, 119 (1967).

APPENDIX B

COMMUNICATIONS ACT OF 1934, AS AMENDED (47 U.S.C. SEC, 151 *ET. SEQ.*)

§ 307. Licenses; allocation of facilities; terms; renewals

* * * * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

§ 309. Application for license – Considerations in granting application.

* * * * *

Petition to deny application; time; contents; reply; findings

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of

public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other maters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

* * * * *

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission

for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

APPENDIX C

RULES 74.1105, 74.1107 and 74.1109 of the FEDERAL COMMUNICATIONS COMMISSION (47 CFR §§ 74.1105, 74.1107, 74.1109)

"§ 74.1105 Notification prior to the commencement of new service. – (a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to entend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served

upon the superintendents of schools in the community and county in which the system will operate and the local, area and state educational television agencies, if any.

"(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

"(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; provided, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thrity (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

"(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

"**§ 74.1107** Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures. – (a) No CATV system operating is a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a

television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

"(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by §74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

"(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall

extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

"(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: and provided further, that no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature

of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

"(e) Within sixty (60) days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

"§ **74.1109** Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes. – (a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

"(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

"(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

"(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

"(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

"(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply coments.

"(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of

the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

"(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such requests for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

"(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures."

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IN THE

Supreme Court of the United States

October Term, 1968

PIKES PEAK BROADCASTING COMPANY AND
SANGRE DE CRISTO BROADCASTING CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

APPENDIX D

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FCC 68-393

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re
VUMORE VIDEO CORP. OF COLORADO, INC.,
COLORADO SPRINGS, COLO.
Requests for Special Relief Filed Pursuant to Section 74.1109 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSENT; COMMISSIONERS LEE AND LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING AND VOTING FOR A HEARING.

1. On August 18 and 30, 1967, Vumore Video Corp. of Colorado, Inc., proposed operation of a CATV system in Colorado Springs, Colo. (ARB-138), which would carry the following television signals: KKTV (CBS) and KRDO-TV (ABC), both of Colorado Springs; KOAA-TV (NBC), Pueblo, Colo.; and KWGN-TV (independent), KOA-TV (NBC), KLZ-TV (CBS), KBTV (NBC), and KRMA (educational), all of Denver, Colo. The Colorado Springs and Pueblo stations place predicted grade A or better contours over Colorado Springs, while the Denver stations place predicted grade B contours over the city.

2. On September 18, 1967, Pikes Peak Broadcasting Co., licensee of station KRDO-TV, filed a petition for relief against importation of Denver television stations. KRDO-TV requests temporary and permanent relief against the carriage of the predicted grade B Denver signals,[1] pursuant to section 74.1109 of the rules, and requests that the matter be considered in an evidentiary hearing. On March 19, 1968, a similar petition for special relief was filed jointly by Metropolitan Television Co., licensee of station KOAA-TV, and by Sangre de Cristo Broadcasting Corp., a prospective assignee of KOAA-TV.[2]

3. Before considering the basic controversy, we first treat certain preliminary matters raised in connection with SR-973: Requests for consolidation of the instant case with several other pending CATV

[1] Petitioner does not oppose carriage of the Denver educational station, but suggests that its carriage be terminated upon activation of the proposed channel 8 educational station in Pueblo (application of Southern Colorado State College, file No. BPET-232, filed July 12, 1965). Our rules would normally require carriage of both stations, and we are not persuaded of a need to depart from them in this instance. Consequently, we will deny the requested relief as premature; however, the matter can be reopened by petition for special relief when channel 8 becomes operational in Pueblo.

[2] BALCT-342, filed Sept. 29, 1967; Sangre de Cristo Broadcasting is licensee of radio station KCSJ, Pueblo, Colo.

controversies have been made by Mullins Broadcasting Co., licensee of television broadcast station KBTV, Denver, Colo., KRDO–TV, KOAA–TV, and the National Association of Broadcasters; these parties request variously that SR–973 be considered (1) with CATV 100–297 and CATV 100–300, where waivers of the top-100 rules are being sought for CATV systems to operate in the Denver television market (ARB–41); (2) with an application of Mountain Microwave Corp. (file No. 3653–C1–P–68) for authority to provide common carrier relay of the Denver signals to a CATV customer in Pueblo; (3) and with a section 74.1105 notification by Pueblo TV Power, Inc., of intent to commence CATV operations in Pueblo.[3] We will deny all of the requests for consolidation. In view of the separate safeguards provided by section 74.1107 of the rules, it is our policy not to include pending requests under section 74.1107 in consideration of requests for special relief filed pursuant to section 74.1109 of the rules, and we see no reason to depart from that policy in this case. E.g., *Great Lakes Community TV*, FCC 68–24, —— FCC 2d ——. The microwave application involving relay of Denver signals to Pueblo is still being processed and it is not ripe for disposition. Pueblo TV Power's section 74.1105 notification has only recently been filed (February 27, 1968); two requests for special relief against the Pueblo proposal were filed on March 28, 1968,[4] and the period for opposition and reply pleadings has not yet expired. In view of these circumstances, and the fact that Vumore's section 74.1105 notification for Colorado Springs was filed some 7 months ago, we will not further deny Vumore its right to expeditious consideration of its proposal (sec. 74.1109(f) of the rules) because of possible later developments in Pueblo. We note, however, that many of the parties participating in the Colorado Springs case have also entered the Pueblo controversy, and much of the information submitted concerning ARB–138 may apply equally to both cities. In our consideration of the Colorado Springs case, therefore, we have taken into account the prospect of CATV in Pueblo and, to the extent possible, the potential impact in both communities.

4. On December 22, 1967, KRDO–TV attempted to expand the scope of this case to include certain collateral matters, i.e., activities of Vumore, which it claims affect the basic qualifications of Vumore's principals. We will comment upon the allegations briefly: KRDO–TV states that Vumore engaged in "premature" construction of the CATV system and microwave facilities (alleging violation of sec. 319 of the Communications Act as to the latter); that it engaged in deceptive and misleading promotional activities; and that it made political efforts to bring public pressure on the Commission. We hold that the Commission's regulatory program does not presently apply to CATV system construction, so that allegations concerning the laying of trunk

[3] A general request has also been made by KRDO–TV that all CATV activity in the area be considered by the Commission to determine cumulative impact, but KRDO–TV has not served its petitions on all such CATV systems so that they cannot be affected by our present action.

[4] On Mar. 28, 1968, a petition under rule 74.1109 to designate CATV proposal for evidentiary hearing was filed by Metropolitan Television Co. and Sangre de Cristo Broadcasting Corp. On the same date, Pikes Peak Broadcasting Co. filed a petition for relief against the carriage of Denver stations by Pueblo TV Power, Inc. (SR–3689). Also, on Mar. 21, 1968, a statement supporting the CATV proposal was filed by Southern Colorado State College, applicant for educational channel 8, Pueblo.

cable raise no questions; the allegation of "premature" microwave construction is now moot.[5] Alleged violations of section 319 of the act, moreover, do not by themselves raise character questions. A CATV operator's promotional methods are not normally a matter of Commission concern and we do not believe they are a consideration in determining whether to allow the inauguration of new CATV service.[6] The alleged political efforts were apparently directed to persuading the city of Colorado Springs to support a grant of the now-dismissed BPCAR–83. Since these efforts were made on the record, we can see no impropriety in them.

5. Having ruled on the collateral matters, we can now consider the basic controversy. KRDO–TV's pleadings are strung out from September 18, 1967, to March 19, 1968, and comprise some dozen documents with multifarious allegations.[7] We will attempt briefly to list the most pertinent: (*a*) That although the Denver stations place predicted grade B contours over Colorado Springs, they do not provide actual service; (*b*) that extension of "essentially distant" Denver signals would introduce new signals into the heart of a geographically and constitutionally separate market, and thus upset the Commission's Table of Assignments; (*c*) that the Colorado Springs audience will be fragmented to the economic detriment of existing and potential local television stations;[8] (*d*) that the addition of Denver stations would not provide any significant new programing diversity, since the market presently receives full network service; (*e*) that the program exclusivity rules will not protect local, public affairs, or independent nonnetwork programing which constitutes approximately 45 percent of its broadcast week, so that such programing will be curtailed; (*f*) that KRDO–TV as well as potential local UHF stations will be unable to compete with larger Denver stations in procuring independent programs; (*g*) that the market situation indicates without CATV the vacant UHF channels could be activated;[9] (*h*) that "phase II" of Vumore's CATV proposal envisions addition of several distant signals to fill out its system, which will further impair market integrity; (*i*) that Vumore's cross-ownership of CATV systems, television stations, and common carrier microwave systems raises public-interest questions,[10] currently the subject of the *Notice of Inquiry in Docket No. 17371*, FCC 67–460, 7 FCC 2d 853; (*j*) that the potential for establishing pay-TV in Colorado Springs by Vumore

[5] At the time, Vumore was an applicant for a community antenna relay station (BPCAR–83) to provide Denver signals to Colorado Springs. On Jan. 30, 1968, BPCAR–83 was dismissed at Vumore's request.

[6] Which is not to say that the Commission is unable to take appropriate action if it should be considered necessary. See *Pioneer Valley Cablevision, Inc.*, FCC 66–10, 5 FCC 2d 626.

[7] Included is the contents of a petition to deny, filed by KRDO–TV against BPCAR–83, which the station requested be incorporated in its pleadings concerning the instant case.

[8] Petitioner refers to Vumore's prediction that it will achieve 60 percent saturation in Colorado Springs within 7 years, and calculates that this will total 44,600 homes, or over 25 percent of the TV homes in the entire market.

[9] Commercial UHF channel 21 is assigned to Colorado Springs, and commercial UHF channels 26 and 32 are assigned to Pueblo. No applications are pending for any of these channels.

[10] Vumore operates CATV systems in 33 cities, while its parent, RKO General, Inc., owns seven AM and FM radio stations and five television stations. And its minority shareholder also has substantial CATV connections.

raises public-interest questions;[11] (*k*) that the Commission's efforts to reevaluate the use of translators, *Further Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 15971*, FCC 67–706, 8 FCC 2d 569, and to obtain information regarding the operation of its current CATV rules, *Notice of Inquiry in Docket No. 17505*, FCC 67–674, 9 FCC 2d 984, should not be undermined by institution of a CATV proposal touching the heart of issues involved; (*l*) that the Commission should apply the "presumption" of adverse economic impact contemplated in section 74.1107 to all markets, so that the burden falls upon Vumore to disprove injury and demonstrate the public interest and necessity for CATV in Colorado Springs; (*m*) that the Commission's premise of network UHF service in smaller markets does not apply to Colorado Springs because any new UHF station there would be independent; (*n*) and that this case should be consolidated with other CATV proposals in the area to determine cumulative impact on television, determine the future role of CATV, and regulate the amount of service which CATV should be allowed to provide.

6. When the Commission adopted the *Second Report and Order*, it determined that absent a special showing made pursuant to section 74.1109 of the rules, there is no need for prior evidentiary hearing before CATV service may be instituted in below top-100 television markets (pars. 144–146). This policy is grounded on the reasoning that CATV has less potential impact on UHF development in below top-100 markets, since broadcasters in such markets would normally be network affiliates and would receive substantial protection from the program exclusivity rules. KRDO–TV is an ABC affiliate sharing its below top-100 market with KOAA–TV (NBC) and KKTV (CBS), the latter not having requested special relief. Although UHF channels were furnished to this market in the Table of Assignments, and despite petitioner's recitation of favorable conditions for eventual further television expansion, no applications have been filed proposing commercial UHF operation, nor is there any indication of prospect that such applications will be filed. In addition, increased market station profits from 1962 to 1966, coupled with growth in the Colorado Springs area, support the conclusion that CATV and existing broadcast television will successfully exist in this market.

7. The specific allegations listed in paragraph 5 above have been lettered for convenience in our rulings, as follows: (*a*) KRDO–TV alleges that the Denver stations do not provide actual service to Colorado Springs—despite the presence of predicted grade B contours—but fails to support this argument with engineering evidence. See *Shen-Heights TV Association*, FCC 68–168, ——— FCC 2d, ———. In any event, the Commission's rules do not prohibit CATV systems outside the grade A contours of stations in top-100 television markets from importing distant signals. Consequently, the burden rests with KRDO–TV to present special circumstances affecting the

[11] Petitioner argues that despite a city ordinance banning per-program pay-TV, Vumore will maintain four closed circuit channels; that partial owner of Vumore is RKO General, Inc., a proponent of nationwide pay-TV; and that Vumore's financial resources would allow it to outbid local television stations for syndicated programing and films.

public interest which require the imposition of special restrictions on CATV, *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150, and this it has failed to do. Inter alia, we note that table II of exhibit L in the "Coe-Saunders Report" (which is discussed at greater length in par. 8) shows as many as 1,800 market households watch Denver at one time. Presumably this viewing occurs about Colorado Springs since Pueblo is beyond the predicted contours of the market stations. (*b*) The Commission strives to administer its CATV rules so as to insure that television stations are carried on CATV systems within their predicted contours, *Shen-Heights TV Association*, supra. Consequently, Commission policy contemplates that Denver signals be available on a Colorado Springs CATV system absent a showing that such carriage would not be consistent with the public interest. (*c*) It is likely that carriage of Denver signals could have some economic effect on existing and potential television stations; however, it does not appear that the potential impact would be sufficient to threaten the viability of existing or potential stations, and, consequently, this does not provide a public-interest consideration warranting the relief requested. (*d*) This argument overlooks the public benefits which may stem from improved reception, and the convenience of receiving some programs at different hours. However, we agree that the possible programing diversity promised by the CATV would not, by itself, justify the installation of the CATV system. But this is not the question. Rather, since our rules place the initial burden of persuasion on petitioners in this type of case, the question is whether the petitioners have shown possibility of adverse impact upon the public interest. And, as indicated, we conclude that the petitioners have not met this burden. (*e*) This allegation is not sufficiently supported factually. In addition, we note that exhibit L of the "Coe-Saunders Report" indicates very little programing which could be affected. (*f*) This allegation is not adequately supported. In addition, we note that KRDO–TV is a network affiliate, so presumably the bulk of its programing will be obtained through the network. (*g*) General allegations in this regard are made in the pleadings, though without support, and the "Coe-Saunders Report" considers at length the argument that a UHF potential exists. However, as indicated above, our analysis of this market indicates no likelihood of UHF activation in at least the near future. (*h*) Vumore's alleged "phase II" is not an issue here, and can be raised under section 74.1109 if it later materializes. (*i*) Cross-ownership is not prohibited by the Commission's rules and the Commission retains adequate authority to deal with the question should action later appear desirable. In this regard, we note that the general question of cross-ownership between CATV operators and other Commission licensees is currently under study in docket No. 17397; however, we note that any cross-ownership present in this case is not within the same television market. Consequently, we do not believe that the cross-ownership is sufficient to require hearing. (*j*) Pay-TV is prohibited by the terms of Vumore's franchise, and KRDO–TV's arguments that it may later arise are completely speculative. Further, the Commission determined in the *Second Report and Order* that the possibility of pay-TV poses less

of a threat in the below top-100 television markets. Petitioner has not persuaded us to the contrary. (*k*) The matters under study in docket No. 15971 relate to possible improvement in translator service, while the inquiry in docket No. 17505 is concerned only with practical experiences in the operation of our rules. The matters under study in these proceedings are, therefore, simply irrelevant to the present controversy. (*l*) The Commission explained in the *Second Report and Order* as well as the *Reconsideration of the Second Report and Order* why it is appropriate to place the burden of proof on the objector in below top-100 proceedings, and see paragraph 6, supra. Petitioners' general arguments do not show any need to depart from this policy determination. (*m*) Although it is undoubtedly true that a UHF entering this market would be independent, we have decided that the available information indicates no prospect of early UHF activation. (*n*) This has been dealt with in paragraph 3 above. In short, KRDO–TV has failed to establish special circumstances which would justify grant of the special relief it has requested, *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150.

8. In addition to the arguments contained in the pleadings, discussed in the preceding paragraphs, on March 11, 1968, the licensees of KRDO–TV and KOAA–TV filed an economic study, entitled "An Analysis of the Colorado Springs-Pueblo Television Market: Its History, Status, and Future" ("Coe-Saunders Report"), which is intended to support the asserted need for a hearing. We have carefully considered this filing, but do not feel that it is sufficiently supported to justify a hearing. Nonetheless, we believe the filing of this type of study has value, so we will set forth our most immediate objections in the hope they will be met in any similar filings in the future.

(*a*) Procedurally, the study was filed hopelessly late. In this regard, we note that there is no claim that Vumore was ever advised of the commissioning of the study or given any opportunity either to consult on methodology or to supply relevant data. Thus, it is only fair to assume that Vumore was surprised by the study and thus deprived of any opportunity to respond in kind. We recognize that economic studies are frequently prepared without consultation in adversary proceedings and we normally do not object to the practice, since it does not intrude on basic fairness. But here, petitioners were aware that section 74.1109(f) of the rules requires expeditious action, so that the sudden, though belated, appearance of the study could deprive Vumore of either its right to expeditious action or the opportunity to obtain a rebuttal study.

(*b*) As with the pleadings discussed in the preceding paragraphs, the study fails to supply the specific information called for in *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150. In this regard, we note that, rather than supply balance sheet data which could be subjected to accounting analysis, exhibit F of this filing includes a "composite" form 324 which, by its nature, precludes any attempt at analysis to determine such matters as depreciation rates. Consequently, while the study proposes interesting generalities they are somewhat unrelated to the specifics

of the stations and market in issue. And we note that no market licensee represents that it fully endorses the study.

(*c*) Our analysis of the specifics of the study raises further questions, the most pertinent of which we will discuss. In exhibit G, the researchers project continued increase in market revenues and urge that this may eventually attract UHF entry. Leaving aside the question of UHF entry for the moment, it appears that the projected increases would be sufficient to protect the viability of existing market stations whether or not CATV is allowed into Colorado Springs.

(*d*) Experience in the broadcast industry does not persuade us that the profitability of VHF stations in a market assures comfortable UHF entry. Petitioners seek to buttress their projections of increased market revenues, as an inducement to UHF entry, by reference to the four-station Las Vegas market. Unmentioned is the fact that the fourth station in Las Vegas is VHF, nor does the study claim that the fourth Las Vegas station is profitable. Finally, the study seeks to overcome the threshold question whether this market is or soon will be attractive for UHF entry by assuming its answer. This is an unsatisfactory method in an adjudicatory proceeding, and we must reject it.

(*e*) Although we cannot accept the proposition that the report establishes any likelihood of UHF entry, its failure to persuade is not conclusive of the question. Consequently, we will consider the material designed to show the impact of CATV on a hypothetical market UHF. The report relies on Bakersfield experience as analogous without sufficiently distinguishing other similar markets where no claim is made that CATV has had any injurious effect. Further, the report overlooks that Bakersfield—one of the deintermixture markets—has had a history of economic problems. This history is not mentioned, nor is attempt made to show how CATV has compounded preexisting problems. Instead, reliance is placed on an ARB report of Bakersfield viewing and resulting projections. These projections appear valueless, since:

1. The ARB report states that its "data are below ARB minimum standards" and suggests that the results be treated as "indicative only."

2. No figures are given on the size of the CATV audience in Bakersfield, so that it is not at all clear that the claimed drop of market viewing could reflect CATV homes.

3. The various charts and graphs do not discuss viewing habits in the crucial prime-time hours when the bulk of network revenues are earned, and when program exclusivity should be of maximum value (for example, table II only gives data from 7–7:30 p.m. and from 11 p.m. on). Consequently, the apparent efforts to project non-prime-time viewing patterns in Bakersfield into prime-time viewing in Colorado Springs-Pueblo is totally unpersuasive.

4. Table III is an apparent miscalculation. Proceeding from the assumption that 90,000 households are involved [12] and that program exclusivity will not be provided despite Commission rules to the contrary, it provides figures involving percentages of penetration and viewing which are nowhere else claimed to be at issue.

In view of these objections, we must reject this portion of the report as not supported.

(*f*) Various conclusory arguments are advanced throughout the report. Two of these, based on the assumption of increased market revenues absent CATV, merit mention. First, it is asserted that licensees may "finally" anticipate "a reasonable return on their investment," but no supporting economic data is offered. And see *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. Second, it is asserted that revenue growth in the market should permit stations to expand service in such areas as local news and local public service. This assertion seems plausible, but neglects the fact that recent renewal applications for two of the three market stations propose cutbacks in local programing. In this regard, we note the assertion that too-severe CATV competition could cause local programing to suffer, but we also note the lack of supporting accounting data.

(*g*) Finally, we consider exhibit L, which seeks to establish that program differences between Denver and Colorado Springs-Pueblo are minor, that CATV will not serve a significant function in providing program diversity, and that only 11 percent of the programs broadcast by Denver network stations are not broadcast by the market stations. Conceding that this exhibit has weight on these points, it impeaches arguments made elsewhere, since it reveals the limited nature of the programing which will not receive protection from program exclusivity. Inter alia, it would have been helpful if exhibit L revealed broadcast times since, as framed, it is not clear that even 11 percent of the program time of the stations is not subject to program exclusivity.

In conclusion, although praiseworthy effort has been made to supply pertinent data, we conclude that the report is insufficient to show that hearing is warranted.

9. In view of the foregoing, we find that the proposed operation of Vumore's CATV system in Colorado Springs will be consistent with the public interest.

Accordingly, *It is ordered*, That the petition for relief against importation of Denver television stations, filed on September 18, 1967, by Pikes Peak Broadcasting Co., directed against Vumore Video Corp. of Colorado, Inc.'s section 74.1105 notifications, *Is denied*.

It is further ordered, That the petition for special relief, filed on March 19, 1968, by Metropolitan Television Co. and Sangre de Cristo

[12] Which is not so. Exhibit A of the report lists the 1966 populations of Colorado Springs as 97,500 and Pueblo as 99,300. Totaling these figures and dividing by 3.3 to obtain TV households indicates that the correct figure for TV households is 59,633. The report's assumption is based on households in the counties where these towns are located—but the report does not claim to consider CATV in the counties or explain how CATV is to reach rural populations.

Broadcasting Corp., directed against Vumore Video Corp. of Colorado, Inc.'s section 74.1105 notification, *Is denied.*

It is further ordered, That the comments of Mullins Broadcasting Co. on petition for relief against importation of Denver television stations, filed by Pikes Peak Broadcasting Co., *Are denied.*

It is further ordered, That the petition to consolidate, filed on January 4, 1968, and the petition to consolidate, filed on February 13, 1968, by Pikes Peak Broadcasting Co., *Are denied.*

It is further ordered, That the petition to consolidate and set the above-captioned matters for evidentiary hearing, filed on March 12, 1968, by the National Association of Broadcasters, *Is denied.*

It is further ordered, That Vumore Video Corp. of Colorado, Inc., *Is authorized* to operate its Colorado Springs, Colo., CATV system as proposed in its section 74.1105 notifications of August 18 and 30, 1967.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I must dissent. This is an extremely complex and important case—witness the number and volume of pleadings and other filings and the intervention of the National Association of Broadcasters. I wish I could deal with the matter at greater length, but will have to be content with a hurriedly prepared commentary on the majority's opinion.

First, I think that this is only part of a bigger picture. For some reason some of the most elaborate CATV operations yet devised are proposed for the Denver-Colorado Springs-Pueblo area. I think that all of these proposals should be considered together, including the related microwave applications, as was requested by the NAB and certain of the broadcasters in these communities. Certainly, common issues are presented, and the critical ultimate issue is the cumulative impact of present and projected cable operations upon present and potential local broadcast operations in the area. I do not think the majority are in a position to make a really informed judgment when they deal with just one small part of the overall complex. For example, in the last sentence of paragraph 4 they say that in considering this case, involving Colorado Springs, they have also "taken into account the prospect of CATV in Pueblo." After this bold statement, they never again refer to the Pueblo proposal—and to the best of my recollection it was never discussed during our all too brief consideration of this matter.

The majority point out, in paragraph 6, that since Colorado Springs-Pueblo is not among the top-100 markets of the country, there is no need for an evidentiary hearing before CATV service may be instituted unless the broadcasters seeking special relief above and beyond our rules make a special showing justifying such a hearing. While I dissented to that part of the *Second Report and Order* which withheld protection against the importation of distant signals from broadcasters in the smaller markets who, in my judgment, normally need it even more than their counterparts in the top-100 markets, I

recognize that this is the policy to be applied here. But I think the majority have here written section 74.1109 right out of the rules as far as broadcasters in small markets are concerned.

If the very substantial showing made here is not adequate to entitle the local broadcasters to a hearing in which they can undertake to prove their allegations, then I think it very unlikely that such a showing can be made. Surely, the broadcaster seeking relief under section 74.1109 is not required to prove his case in his pleadings. It must be enough if he tenders specific, factual allegations which, if proved, would entitle him to relief.

Here, very substantial pleadings have been filed which seem to me to raise substantial factual issues, and they have been supported by a study which is the most voluminous and detailed I can recall having been filed in any section 74.1109 case. While there may be gaps or flaws in it which would have to be tested if a hearing were held, it was prepared by two responsible and respected members of the faculty of the School of Communications of Ohio University in Athens, Ohio, both of whom have had prior experience in the broadcasting industry. They had assistance from another faculty member and a graduate student with impressive qualifications, including backgrounds in qualitative research and in broadcast ratings. Their study seems to have involved the use of standard research techniques, and is certainly of sufficient stature to merit detailed examination in a hearing. When I consider the flimsy showings upon which the majority have granted cable operators' requests for waiver of our top-100 market policy, I am appalled at their rejection of this no doubt imperfect but, nonetheless, very significant study.

I not only think the majority are acting arbitrarily in rejecting the study, on the basis of very selective discussion of a few of its elements,[1] but I am concerned about the force of this action as a precedent. What small-market broadcaster, noting the cavalier treatment given to this very substantial effort, is likely to expend the time and money involved in such research in a future effort to obtain relief under section 74.1109? Yet the Commission, in adopting that provision of the rules and in its discussion of the question in the *Second Report and Order*, specifically represented that upon a proper showing it would designate a small-market broadcaster's request for special relief for an evidentiary hearing. The majority have already denied such requests for hearings in a number of cases. In some of these I agreed that the broadcaster's showing was inadequate, consisting of mere conclusionary pleading. In others, I thought the showings, though much less substantial than the one made here, were sufficiently specific to justify hearings. But none of those actions went so far as this one toward making a dead letter of section 74.1109.

Furthermore, this result is clearly inconsistent with the Commission's action in the one case I can recall where we designated a matter of this kind for hearing. That was *Taft Broadcasting Company (WKYT-TV)*, 5 FCC 2d 746. There, the four communities where cable operations were proposed were from 24 to 33 miles from Lexing-

[1] I will discuss the majority's treatment of the study in more detail below.

tor; here, the CATV system is to be built right in Colorado Springs, with a similar operation proposed for Pueblo, thus putting cable operations right in the dual heart of this hyphenated market. There, the CATV system's subscriber potential would have represented a minute percentage of the total homes in the market. Here, Vumore predicts 60 percent saturation in Colorado Springs within 7 years, which Pikes Peak calculates would represent over 25 percent of the TV homes in the entire market. I recognize there are differences between the cases. Lexington is an all-UHF market, while this one has three VHF stations but any additional stations will be UHF. And the signals sought to be barred in the Lexington case were those of distant stations, while the Denver stations here involved provide a predicted grade B signal to Colorado Springs. But I don't see how anyone studying these two cases can avoid the conclusion that the proposal here involves a much more serious threat to the local stations, present and potential, than that in the Lexington case. So why the difference in treatment?

In addition, the broadcasters here have pointed out very clearly that the rationale advanced in the *Second Report and Order* for differentiating between the top-100 markets and those below that cutoff point does not apply here. The majority say that this difference in policy "is grounded on the reasoning that CATV has less potential impact on UHF development in below top-100 markets, since broadcasters in such markets would normally be network affiliates and would receive substantial protection from the program exclusivity rules." Actually, what paragraph 145 of the *Second Report* says is:

> * * * In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the nonduplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. * * *

But here this smaller market already has three network-affiliated stations, so that any new station will be an independent as to whom the assumption of benefit from the nonduplication rule is inapplicable.

In the face of this, the majority blandly say:

> Although UHF channels were furnished to this market in the Table of Assignments, and despite petitioner's recitation of favorable conditions for eventual further television expansion, no applications have been filed proposing commercial UHF operation, nor is there any indication of prospect that such applications will be filed.

These allocations were made by this Commission to provide for reasonably expanded service in this television market, the second largest in the State of Colorado. While the allocation of a television channel is no guarantee that a station will be built to operate on it, the Commission no longer makes allocations simply because a channel will fit in a given location. Our present Table of Assignments is an unsaturated one, including provision only for those communities thought to have some potential for supporting additional stations. It is precisely that potential for expanded free local service for all in the area that our CATV rules are supposed to preserve. We said in the *Second Report and Order*

that we wanted to take hold of the future, but the majority now seem intent on giving it away.

They seem to be saying that no effort should be made to preserve the potential for additional UHF stations unless applications are on file. I think this is a terribly shortsighted attitude which will insure that no one will ever apply for these channels. I think the majority are clearly in error in saying that there is no "indication of prospect that such applications will be filed." Certainly, the local broadcasters have not proven that one or more of these channels will be occupied, but I think they have offered a rational argument that conditions in the market are such that there is a real possibility that an additional station will be built. Certainly, I think their showing is substantial enough to justify exploring the matter in a hearing. But this assumes that a prospective applicant would face the competition of just the three local stations. I admit that it may require some courage to build an independent station in a market of this size, but I think that, without CATV complications, one or more additional services could be expected in time. But I think it would be foolhardy for anyone to put a new station on the air in competition with seven commercial signals—much less the further fragmentation portended by Vumore's projected phase II. I think that the majority have here ended all possibility that Colorado Springs-Pueblo will get additional local service—the only kind that the rural population and the low-income urban residents could look forward to. This is not my idea of the way to go about building an expanded nationwide television system.

The majority have undertaken to list the "most pertinent" allegations of KRDO–TV[2] in paragraph 5, lettering them for identification, and have then purported to answer them, in the same order, in paragraph 7. There is not time to deal with all of these matters, but I would like to consider what I believe to be the most important ones. For this purpose I will use the same letter identifications employed by the majority. In each case I will paraphrase or quote the majority's characterization of KRDO's *allegation*, together with their *answer*, and will then add my *comment:*

(*a*) *Allegation.*—That although the Denver stations place predicted grade B contours over Colorado Springs, they do not provide actual service.

Answer.—KRDO fails to support this argument with engineering evidence. In any event, since Colorado Springs is outside the grade A of any top-100 market station, the rules do not prohibit importation of distant signals and KRDO has the burden of presenting special circumstances requiring special restrictions on CATV—and this it has failed to do. Furthermore, table II in exhibit L (apparently they mean exhibit B) in the "Coe-Saunders Report" shows that as many as 1,800 market households watch Denver at one time.

Comment.—This last is true for the nighttime hours, but that represents less than 2.5 percent of the market homes viewing the

[2] No reference is made to the pleadings filed by the other broadcast interests here, except for the study filed jointly by KRDO and KOAA. I have not had time to see whether they raised additional points, so will simply deal with those listed by the majority.

three local stations during the same periods. This seems to me clearly to substantiate KRDO's claim that Colorado Springs-Pueblo, by virtue of terrain obstruction and the history of television development in the area, is a completely distinct television market with its own three network-affiliated stations and with very little penetration from the nearby Denver market. Clearly, carriage of the Denver stations on a CATV system in Colorado Springs will make their signals fully as accessible as those of the local stations and will presumably result in increased viewing of the Denver signals—with resultant fragmentation of the local stations' audiences.

In any event, KRDO is not arguing that the Denver stations' grade B contours do not encompass Colorado Springs or that their signals are not viewed minimally there, so there is no need for an engineering showing. Rather, it urges that the two markets, despite interpenetration, are much more distinct than the Baltimore and Washington markets discussed in footnote 69 of the *Second Report and Order*. We there stated an exception to the general proposition that CATV activity not involving extension of a signal beyond its grade B contour may freely continue, noting that "if two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations." If you substitute Denver for Washington and Colorado Springs for Baltimore, this statement fits the present case. I think the pleadings clearly require a hearing to permit detailed consideration of this matter. The course adopted by the majority completely ignores the footnote 69 issue and disposes of the case as if this were a run-of-the-mill request by a small-market broadcaster for extraordinary relief to protect his outlying coverage area.

(*b*) *Allegation.*—That extension of "essentially distant" Denver signals would introduce new signals into the heart of a geographically separate market, thus upsetting the Commission's Table of Assignments.

Answer.—The Commission tries to administer its CATV rules so as to insure that stations are carried on CATV systems within their predicted contours, so that Denver signals should be carried on a Colorado Springs system absent a showing that this would not be consistent with the public interest.

Comment.—This argument is related, of course, to the preceding one. There can be no doubt that the majority are permitting, in a practical sense, the introduction of signals not now a serious factor in the market, and that this materially alters the plan for local service in Colorado Springs that is embodied in our Table of Assignments. The Commission's reply again disregards footnote 69, which clearly states that different problems are posed in situa-

tions of this kind. Their recital of the assumptions underlying our basic top-100 market rule is, therefore, inappropriate. As indicated above, I think the local stations have made a showing that carriage of the Denver stations would not be consistent with the public interest.

(*c*) *Allegation.*—That the Colorado Springs audience will be fragmented to the economic detriment of existing and potential local television stations.

Answer.—The majority concede that carriage of the Denver signals could have some economic effect on existing and potential stations, but that it does not appear the impact would be sufficient to threaten the viability of existing or potential stations.

Comment.—Whereas KRDO's allegation is substantially supported, the majority simply state their contrary conclusion without explanation.[3]

(*c*) *Allegation.*—That the program exclusivity rules will not protect local, public affairs or independent nonnetwork programing which constitutes approximately 45 percent of KRDO's broadcast week, so that such programing will be curtailed.

Answer.—This allegation is not sufficiently supported factually. In addition, exhibit L of the "Coe-Saunders Report" indicates very little programing which could be affected.

Comment.—The allegation that the program exclusivity rules will not protect the nonnetwork programing of the Colorado Springs-Pueblo stations is obviously true and needs no detailed factual allegations to support it. The claim that this will result in curtailment of such programing is more problematical, but I think KRDO and KOAA, in their pleadings and in the Coe-Saunders study, have alleged enough facts to require a hearing. For example, they have shown that the Colorado Springs-Pueblo market is peculiarly vulnerable to CATV impact because a high percentage of the audience in the market lives in the metropolitan areas of the two central cities; that the Denver stations are not now a serious factor in this market, but will provide heavy competition if carried on cable systems there; that a significant part of the local stations' programing is nonnetwork and will be duplicated by the Denver stations, often in advance, so that the local stations' schedules will be less attractive and their audiences will be smaller; and that this has happened in Bakersfield, which is a comparable market. It seems to me that this adds up to a real likelihood that the local stations will have reduced revenues and will be forced to curtail their program service. The majority clearly misinterpret exhibit L of the Coe-Saunders study. This exhibit simply shows the types and number of programs broadcast by the stations in Colorado Springs-Pueblo which are not also broadcast by the Denver network-affiliated stations—and vice versa. It does not in any way affect the fact that only 55 percent of KRDO's programing will be protected against fragmentation

[3] They do comment, in par. 8, on some aspects of the Coe-Saunders study which relate to this argument. I will discuss this below.

by the Denver network-affiliated stations—and none of it will be protected against competition from the Denver independent.

(*f*) *Allegation.*—That KRDO, as well as potential local UHF stations, will be unable to compete with the larger Denver stations in procuring independent, that is, syndicated and feature film, programing.

Answer.—Again, the majority simply say that this allegation is not adequately supported, also noting that KRDO is a network affiliate so presumably obtains the bulk of its programing through its network.

Comment.—Again, I think KRDO's allegations are adequate. In addition, it cites the Commission's own statement in paragraph 123 of the *Second Report and Order* with respect to the disadvantage independent UHF stations would have in competing with the big city independent VHF stations likely to be brought in from bigger markets by the CATV operator. I think this has relevance to the problem of a station in a smaller market in trying to buy syndicated programs and feature film when a station in a larger market which is imported into the smaller market by cable systems is also bidding for such programs. It seems quite likely that the Colorado Springs-Pueblo stations will take a back seat in such negotiations. The statement about KRDO's getting most of its programing from its network is utterly irrelevant, since the station's argument here goes only to its acquisition of *non*-network programing.

(*g*) *Allegation.*—That the market situation indicates that without CATV the vacant UHF channels could be activated.

Answer.—The general allegations to this effect in the pleadings are unsupported, and while the "Coe-Saunders Report" argues that there is a UHF potential, our analysis of the market, as indicated above, indicates no likelihood of UHF activation in at least the near future.

Comment.—Here, the majority again use the handy formula that this allegation is "without support" in the pleadings. When required to consider the Coe-Saunders study, they avoid the issue by referring to a market analysis which they say is "indicated above." This must refer to paragraph 6, where all the majority says about this issue is:

> Although UHF channels were furnished to this market in the Table of Assignments, and despite petitioner's recitation of favorable conditions for eventual further television expansion, no applications have been filed proposing commercial UHF operation, nor is there any indication of prospect that such application will be filed.

It is clear that whatever analysis the majority have made of the Colorado Springs-Pueblo market, they do not propose to reveal their reasoning to anyone. I think this is arbitrary and capricious. Furthermore, while not without flaws, I think the Coe-Saunders study makes a persuasive case that the market can, in the near future, support at least one more station. Certainly, I think this showing is adequate to necessitate a hearing before writing off for good and all the additional allocations we have made for this market.

(*h*) *Allegation.*—That phase II of Vumore's CATV proposal envisions addition of several distant signals to fill out its system, which will further impair market integrity.

Answer.—Vumore's alleged phase II is not an issue here, and can be raised under section 74.1109 if it later materializes.

Comment.—I don't know why the majority seem so dubious about phase II. In KRDO's petition to deny, dated December 4, 1967, it clearly alleges that Vumore is constructing a 20-channel system and has promised the delivery of Los Angeles and San Francisco signals in addition to those from Denver. Exhibit 3 attached to the pleading includes a page from Vumore's proposal to the Colorado Springs City Council. It is entitled "phase II" and lists 20 channels of programing, including the three local stations, five Denver stations, plus a proposed Denver UHF station, six Los Angeles independent stations, one San Francisco independent station, and four closed circuit channels (weather, news wire, Wall Street market reports, and a sports wire). That seems specific enough to require consideration of Vumore's entire proposal, and I think the majority's refusal to do so is irresponsible. Clearly, this would represent overwhelming fragmentation of the Colorado Springs-Pueblo audience, most of it by independent stations as to which our nonduplication rules provide no protection. I think that importation of the five Denver signals will block any UHF development in this market, so that when the majority finally gets around to considering phase II they will have even stronger grounds for concluding that Vumore's elaborate plans—the most extensive to come formally before the Commission thus far—pose no threat to UHF expansion; and their analysis of the allegations here gives me no confidence that they will do any better with a determination of the question of impact of further imported signals on the existing stations. In addition, if the system is fully built on this foot-in-the-door basis, the pressure to approve the expansion of its service will be enormous. I think we should consider the whole package now.

(*j*) *Allegation.*—That the potential for establishing pay television in Colorado Springs by Vumore raises public-interest questions; that despite a city ordinance banning per-program pay-TV, Vumore will provide four closed circuit channels; that RKO-General, Inc., a major stockholder in Vumore, is a proponent of nationwide pay-TV; and that Vumore's financial resources would allow it to outbid the local stations for syndicated programs and films.

Answer.—Pay-TV is prohibited by the terms of Vumore's franchise, and KRDO's arguments that it may later arise are completely speculative. Further, the Commission determined in the *Second Report and Order* that pay-TV poses less of a threat in markets below the top 100 and petitioner has not persuaded to the contrary.

Comment.—I think KRDO's allegations in this respect are substantial and merit exploration in a hearing. The limit on pay-TV set forth in Vumore's franchise clearly falls short of

prohibiting the provision of nonbroadcast programing on vacant channels for an incremental monthly charge. The majority's assertion in the *Second Report* that pay-TV is less of a threat in smaller markets does not mean that there is no possibility of its developing in communities like Colorado Springs. Vumore itself conducted an experimental pay-TV operation—of the kind which would be possible under its franchise here—in the late 1950's in Bartlesville, Okla., which is smaller than Colorado Springs. That operation failed, but times have changed and such an operation here would be part of a broader and almost certainly profitable CATV service.

The majority then turn to the "Coe-Saunders Report" and set forth their principal objections to it. First, they complain that it was filed too late and that Vumore was given no notice of the commissioning of the study and no chance to consult on methodology or to supply relevant data; so was presumably "surprised" by the study and deprived of any opportunity to respond in kind.

Vumore gave the required section 74.1105 notice of its intention to commence a new cable TV service in Colorado Springs on August 16, 1967. KRDO filed a timely petition for relief against importation of Denver television stations on September 18, 1967. Vumore filed an opposition to petition of KRDO–TV against carriage of Denver stations on October 25, 1967. On December 4, 1967, KRDO filed a petition to deny directed against Vumore's application for a Community antenna relay station to serve its proposed CATV system in Colorado Springs. Apparently, Vumore did not reply to this, but instead withdrew its application on January 30, 1968. A good many additional and related pleadings have been filed by these parties, as well as by other broadcast and cable interests. There is no indication of any undue delay in the filing of any of these papers, and it appears to me that we have reached and disposed of this matter quite expeditiously.

I find no indication of the date on which the Coe-Saunders study was commissioned. In any event, the substantial size and character of the report indicates that it must have taken some time to compile, especially since it was prepared by men who obviously had other basic academic commitments requiring a good deal of their time. Though the study is dated February 1968, one element on which it is based, a special tabulation as to the Bakersfield market prepared by ARB, is dated March 7, 1968. The completed report was filed under cover of a letter dated March 11, 1968, which recites that the study was completed March 10, 1968. If the Commission is going to insist on detailed showings in these cases it must allow time for their preparation. I do not think this one was untimely filed.

Nor do I know of any requirement that a party notify his adversary of the undertaking of a study of this kind for use in cases of this type. Indeed, the majority recognize that economic studies are frequently prepared without consultation in adversary proceedings, but apparently find that section 74.1109(f) imposes a different requirement. I do not so read the rule, and if the majority intend to require some kind of notice with respect to studies of this kind I think they

should clearly spell out their policy in some detail so that interested parties will be fully informed.

Despite these strictures the majority purport to have considered the study, but say that they "do not feel that it is sufficiently supported to justify a hearing." I disagree, and really cannot understand what more the majority can require at this stage in proceedings such as this. While the study is not dispositive of a final decision on the merits, I think it clearly establishes the need for a hearing.

The majority say that the study fails to supply the specific information called for in *Central New York Cable TV, Inc.*, 11 FCC 2d 150. We said there:

> "* * * In the case of relief requested waiver of section 74.1107, this means that full and precise facts must be presented demonstrating why it is believed that such waiver action would be consistent with 'the establishment and healthy maintenance of television broadcast service in the area' (74.1107(a)). Obviously, a person asking the Commission not to apply a rule which it has adopted is expected to provide a full and detailed justification for the exception. The waiver petition must, therefore, develop the available facts concerning the cumulative effect of operation of this system, together with all other systems (in operation or proposed) similarly situated in the pertinent predicted grade A area (e.g., at similar or greater distances from the main community), on existing stations and on the prospects for activation of channels not yet on the air (in terms of such factors as probable audience, revenue, income, and program service, including likelihood of network affiliation). Parties may, of course, bring to our attention and we will consider on our own motion other information or considerations deemed relevant to a determination of the public interest in the particular situation.
>
> "6. Similar considerations as to cumulative effect and effect on likelihood of obtaining a network affiliation are applicable in the case of the 74.1109 petition requesting relief in the below top-100 market situation.[7] In this connection, we also note our recent statement in *Quincy Cablevision, Inc.*, FCC 67-981:
>
> > "The showing which it was thought would have to be made was expected to include 'specifies regarding its present financial condition, the impact any present CATV activity has had on its operation, or the exact nature of the other CATV operations it refers to.' E.g., *GT&E Communications, Inc.*, FCC 67-134, 6 FCC 2d 643.[2] While these considerations are not intended to be all inclusive, it is obvious that some demonstration along these lines must be made if the request for special relief is to be viewed as more than mere speculation. Similarly, we believe it reasonable that a network affiliated station, arguing that it will not be adequately protected by the program exclusivity requirement, make some factual showing. Compare *Jonesboro Cable TV, Inc.*, FCC 67-282, —— FCC 2d ——. This serves to direct hearing resources to those cases where it appears that an evidentiary hearing record would be substantial assistance in ultimate decision." [Footnotes omitted.]

It seems to me that, on the contrary, the study supplies the kind of information referred to, plus a lot more. Since the cable system here is in the heart of the market, it is clear that the majority would rule similarly in any community in the market where anyone wanted to build a cable system, so that the cumulative impact would presumably involve every community large enough to support a system. Certainly, a great deal of attention is given to the specific impact of the proposed systems in Colorado Springs and Pueblo (the "other CATV operations" referred to), both in terms of the existing stations and the prospects for activation of additional channels—and this is done in

terms of the indicated factors of probable audience, revenue, income, and program service, and with due regard for the fact that a new station would not have a network affiliation. Specifics are given as to the financial condition of the existing stations. No claim is made that present CATV activity has had any impact on the existing stations, since "The only other CATV systems authorized and/or operating are mainly on the fringes of the Colorado Springs-Pueblo television coverage area and are of extremely small size (see exhibit C)." While it may be true that the study does not label its data precisely in accordance with the terminology of the *Central New York* case, it contains everything called for—and much more. I, therefore, think the majority's statement is completely in error.

The majority note particularly that instead of supplying balance sheet data which could be subjected to accounting analysis, the study includes a composite form 324 which does not permit determination of such matters as depreciation rates. I do not understand this sudden interest in depreciation rates, because I cannot recall any other CATV case in which the Commission has given consideration to depreciation policies. In any event we have the individual form 324's for these stations, as well as the balance sheets filed triennially in connection with their renewal applications, so that the majority could have consulted these if they wished further data.

The majority then state:

> Consequently, while the study proposes interesting generalities they are somewhat unrelated to the specifics of the station and market in issue. And we note that no market licensee represents that it fully endorses the study.

I find these two statements incomprehensible. The study is replete with data which relate directly to the Colorado Springs-Pueblo market, and it seems to me that the conclusions drawn therefrom are reasonable enough to require further hearing on the matters discussed. The study was submitted on behalf of the licensees of KOAA–TV and KRDO–TV by their respective counsel, and as far as I can determine each of these stations vouches for the report and relies on it.

The majority then discuss further questions which they believe are raised by the report. They attack exhibit G on several grounds. First they say that its projection of continued increase in market revenues seems sufficient to protect the viability of the existing market stations even if CATV is allowed in Colorado Springs. This simply does not follow. The projected revenues set forth in exhibit G are explicitly based on the assumption that no serious CATV penetration occurs in the market. Other portions of the study, particularly exhibit H, reasonably suggest, however, that CATV penetration would quite probably result in a loss of $200,000 in revenue, which, because of the market's high expense-to-revenue ratio, could cause the closing of at least one of the existing stations.

The majority then say that VHF station profitability in a market does not insure comfortable UHF entry. While this has a ring of reasonableness, it is essentially meaningless. Certainly, VHF profitability is more favorable to UHF entry than unprofitability would be. And no one is predicting "comfortable" entry for a putative UHF station in this market. Nearly all new stations, VHF and UHF alike,

lose money in their early years of operation. The question is whether at some point in the reasonably foreseeable future someone will decide that conditions are favorable enough to justify applying for authority to build a station in the market. I think the study indicates sufficient potential for such a development to require a hearing to determine whether CATV penetration of the heart of the market would be likely to frustrate this prospect for additional local free television service.

It is then noted that the study refers to the construction of a fourth station in Las Vegas, which is a smaller market than Colorado Springs-Pueblo. However, it is pointed out that the study ignores the fact that the Las Vegas station is VHF and that it is not claimed that the station there is profitable. While a VHF station certainly has its advantages, there is significant interest in building independent UHF stations as well. The point being made is that even in this smaller market, someone has made the judgment that there is sufficient potential to justify building a fourth station. As noted above, it is not surprising that the Las Vegas station may not have achieved profitable operation, since it has only been on the air since September 1967.

The majority then say that on this question the study assumes its answer. I think this is a completely inaccurate characterization of the study, which goes into this whole issue at substantial length. In fact, the majority demonstrate a much greater proclivity for assuming their conclusions than do the authors of the study.

The majority, without conceding the likelihood of UHF entry into this market, then purport to consider the material designed, they say, to show CATV impact on a hypothetical market UHF. This involves reference to data in the study as to cable impact on the local stations in Bakersfield, although as I read the report this is designed to show impact on existing network affiliated stations as well as potential independents. They first criticize use of the Bakersfield experience "without sufficiently distinguishing other similar markets where no claim is made that CATV has had any injurious effect." I assume that the authors of the study, because of considerations of time and expense, felt they should study one of the six three-station markets having significant operating cable systems in their core cities. That seems reasonable to me, even assuming that they may have picked the one which preliminary inquiry showed to be the most favorable to the position of the broadcasters who commissioned their work. They explain their selection of Bakersfield in rational terms, and other grounds for distinction occur to me. If there are flaws in their reasoning—as to market selection or as to interpretation of the data—this should be examined in a hearing.

Beyond that, the majority comment that the report overlooks the fact that Bakersfield was one of the deintermixture markets and that it has had a history of economic problems. I don't understand the relevance of this. All that deintermixture involved was an equalizing of competition among the three stations in the market, and I do not see how that could either contribute to the alleged economic problems of the local stations or detract from the study's showing that CATV importation of distant signals has reduced the local stations' audiences. It is true that the Bakersfield market has shown an aggregate loss in

recent years, but the study does not rely on the earnings record of the stations there. Rather, it demonstrates a reduction in their audiences because of diversion to the distant stations imported by the CATV systems beginning in 1966. I do not see that this showing is impaired, because the local stations were already having economic difficulties.

The majority then say "nor is attempt made to show how CATV has compounded preexisting problems." This is clearly not true. The study shows that in 1965 the Bakersfield stations delivered 51,000 homes in prime time and 42,000 homes between 5 and 7:30 p.m., but that after cable operations commenced in 1966, these audiences were reduced in 1967 to 46,000 and 37,100, respectively, representing more than a 10-percent loss of audience in each case in spite of the fact that population in the area was growing. A special ARB analysis is then relied on to show that the CATV operations in Bakersfield were instrumental in causing these drops in ratings. This is deducible from the fact that an overwhelming percentage of non-CATV homes are shown to view the Bakersfield stations in all time periods, while from 26 to 68 percent of cable homes view the imported distant stations, depending on the time period involved.[4] From sign-on to signoff, 7 days of the week, the ARB report shows that 7 percent of noncable homes viewed non-Bakersfield stations, while 40 percent of cable homes viewed such non-local stations. This certainly seems to me to indicate that "CATV has compounded preexisting problems."

Of course, the majority are critical of the ARB report and the projections based upon it, but most of their criticisms are either overstated or actually in error. They point out that the ARB report states that its "data are below ARB minimum standards" and suggests that the results be treated as "indicative only." As I understand it, this simply means that because of the sample size, a small rating shown for a specific station in just one of the time periods measured may not be too reliable because the standard deviation is relatively larger in such individual cases. However, the confidence limit for an all day or total week measurement would be quite acceptable, especially when the thing sought to be measured is the breakdown between two groups of stations, as is the case here. In other words, there might be some question about the indication that KNBC had a 7-percent merto share on Tuesday at 7 p.m., but there is a high degree of probability that the three Bakersfield stations were, in fact, limited to about 50 percent of the audience Sunday through Saturday, sign-on to signoff. Thus, the majority should not completely reject this part of the report, as they do, but should simply analyze it with care in accordance with generally accepted ratings research procedures.

Then the majority say that no figures are given on the size of the CATV audience in Bakersfield so that it is not clear that the claimed drop in viewing of market stations could reflect CATV homes. The ARB report indicates that 25.7 percent of the homes measured were cable homes. According to the 1967 edition of "Television Factbook,"[5]

[4] Exhibit H of the study is modified by exhibit C to the reply to opposition to petition for continuance of temporary stay pending judicial review, filed by KOAA and KRDO on Apr. 19, 1968.

[5] The figure as to CATV penetration may, therefore, have increased significantly since then.

28.7 percent of the indicated potential homes subscribe to one or the other of the two cable systems in operation there. While these systems do not, of course, serve the entire market; there are other cable operations in the market. In any event, it would seem likely that cable penetration is sufficient to account for the more than 10 percent audience loss indicated. Certainly, enough has been shown to demonstrate that the matter should be explored in a hearing.

The majority next complain that the charts and graphs "do not discuss viewing habits in the crucial prime-time hours when the bulk of network revenues are earned, and when program exclusivity should be of maximum value." They point out, for example, that table II in exhibit H "only gives data from 7 to 7:30 p.m. and from 11 p.m. on." They conclude that the efforts to "*project* non-prime-time viewing patterns in Bakersfield into prime-time viewing in Colorado Springs-Pueblo is totally unpersuasive." [Emphasis added.] This is a plain misreading of the study. Table II does indicate the percentages of cable subscribers viewing non-Bakersfield stations in the periods referred to by the majority, because these are significant time periods, mostly nonnetwork, for which audience measurements are useful. But the table also gives figures for Sunday through Saturday, 7:30 to 9 p.m. and 9 to 11 p.m., and for Saturday, 7:30 to 11 p.m., and that certainly covers all prime time presented in three categories because some people are interested in this additional detail. Thus, there is no effort to "project" non-prime-time viewing into prime time, and the majority's stated ground for criticism simply does not exist.

The majority's last criticism is more valid, but still seems overstated. Table III in appendix H does start with an assumed 90,000 households which approximates the number of television homes in the Colorado Springs-Pueblo stations' metropolitan area (91,100—page 12), rather than just in the core cities themselves. But even if the figures in table III are reduced accordingly, they still indicate a likelihood of significant loss of revenue to the existing local stations in the event of quite probable CATV penetration of the core cities of this market. In addition, of course, it must be noted that if CATV operations of the kind involved here are to be permitted in Colorado Springs and Pueblo, then similar operations would have to be authorized in every community in the market. This, of course, would substantially increase the revenue loss projected in table III. So, again, I think the showing made calls for a hearing, and is certainly far too substantial to justify the majority's characterization of this part of the report as "not supported." There may be flaws in it, but it contains a great deal of material indicating the need for further exploration.

The majority dismiss exhibit L by saying that, to the extent it indicates that importation of the Denver stations will not provide significant additional program diversity, it impeaches arguments made elsewhere, since it reveals how little programing will not be protected under the program exclusivity rule. This completely ignores the fact that the exhibit specifically points out that many of the duplicating nonnetwork programs carried on the Denver network-affiliated stations are broadcast at different times than in Colorado Springs-Pueblo, so that the local stations' presentation thereof will not be protected

by our nonduplication rule. These programs—nearly 90 percent of the stations' programing, excluding local newscasts and feature films—when added to the nonduplicating programs of the Denver network affiliated stations and the probably totally different programs of the Denver independent station, represent a very significant increment in competing programing as to which the nonduplication rule will not apply. This is what will cause the audience fragmentation which the study demonstrates is likely to have such serious impact on the existing Colorado Springs-Pueblo stations, as well as the potential UHF stations which it shows might come into being. But for their mistaken interpretation, the majority agree that exhibit L has weight. Since their effort to weaken it is without basis, the exhibit, like so much else in the Coe-Saunders study, contributes to a very substantial prima facie showing that the importation of the Denver signals into this market will be inconsistent with the public interest.

In conclusion, the majority say that "although praiseworthy effort has been made to supply pertinent data, we conclude that the report is insufficient to show that hearing is warranted." As already indicated, this is the most substantial showing ever made in a case of this kind. It meets every test the majority has ever announced. It stands substantially unimpaired despite the majority's uncritical acceptance of the staff's efforts to undermine it. It is supplemented by substantial arguments in the other pleadings filed by the local stations and by other broadcast interests. If a hearing was ever indicated, it is required here! Yet the majority, without adequate explanation, reject all the contentions and showings of the broadcast parties. They seem determined to turn their backs on the broadcasters in the markets below the top 100. I cannot agree that this is in the public interest, so I must dissent.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1500

PIKES PEAK BROADCASTING COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A 1–25) are not yet reported. The memorandum opinion and order of the Commission (J.A. 200–235—200–261) [1] is reported at 12 F.C.C. 2d 955.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 24, 1969. A petition for rehearing was denied on May 2,

[1] "J.A." refers to the joint appendix in the court below, which has been certified to this Court.

353-873—69

1969. The petition for a writ of certiorari was filed on June 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly declined to hold an evidentiary hearing to consider further the imposition of special restrictions on a CATV system which proposed to operate in Colorado Springs, Colorado.

REGULATIONS INVOLVED

The pertinent provisions of the regulations of the Federal Communications Commission—47 C.F.R. 74.1105, 74.1107 and 74.1109—are set forth in Appendix C to the petition.

STATEMENT

In August 1967, Vumore Video Corporation of Colorado, Inc., ("Vumore") gave notice pursuant to the Commission's CATV regulations (47 C.F.R. 74.1105) of its intention to operate a CATV system in Colorado Springs to carry to subscribers local and Denver television station and FM station signals. Petitioners, the licensees of television stations in the Colorado Springs area, requested the Commission to conduct an evidentiary hearing directed toward imposing upon Vumore "additional or different requirements" (47 C.F.R. 74.1109(a)) than those already provided in the Commission's general rules governing CATV systems in other than the top 100 television markets. Petitioners alleged that there was a potential for UHF development in Colorado Springs which would be endan-

gered by the presence of CATV, and further that CATV would threaten the economic health of existing television stations in that vicinity. They also alleged that Vumore's proposal raised an issue with respect to multiple and cross-ownership of CATV systems.

Under the Commission's CATV regulations, where a CATV system is proposed in a major market (the top 100) an evidentiary hearing is mandatory prior to operation of the system (47 C.F.R. 74.1107), unless expressly waived by the Commission on appropriate petition (47 C.F.R. 74.1109). In a small market (other than the top 100), a system may begin operation after notice has been given to local stations, without an evidentiary hearing. The Commission may, however, determine on its own motion or on petition of a potentially affected television station that operation of a CATV system in a small market would be inconsistent with the public interest (47 C.F.R. 74.1107(c)). Such a determination may be made on the pleadings or after such other proceedings, including oral argument, evidentiary hearings or further written submissions, as appear appropriate to the Commission. These differences in approach are based on the Commission's assessment of the differing economic effects to be expected from the operation of CATV systems in major and in small markets. See *Second Report and Order*, 2 F.C.C. 2d 725; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; Pet. App. A 5–7.

Applying these criteria, the Commission reviewed each of petitioners' contentions, but determined that, even if established, they would not present a situation differing from that contemplated for small markets in

the Commission's *Second Report and Order* adopting the regulations. It concluded, therefore, that the special relief sought by petitioners was not warranted, and accordingly, denied their request for a hearing. It also denied petitioners' request to designate the issue of multiple and cross-ownership for hearing, since that issue is the subject of a pending rule-making proceeding.[2]

On petition for review, the court of appeals (one judge concurring in part and dissenting in part) held that the Commission's decision denying special relief was "supported by the record and should be affirmed" (Pet. App. A3). It noted that petitioners proffered only predictions that UHF would develop in Colorado Springs absent CATV, stated that these predictions in turn rested only on "speculative contingencies," and concluded that the Commission "did not act unreasonably in rejecting [them] as inadequate" (Pet. App. A9). As to petitioners' assertion that the entry of CATV would threaten the economic viability of existing VHF stations in the relevant market, the court noted errors of fact and calculation in petitioners' principal offering, a market study referred to as the Coe-Saunders Report (Pet. App. A 7–8, 10–12), and concluded that the Commission's rejection of petitioners' claims in this regard was "supported in the record and * * * not lacking in reasoned judgment" (Pet. App. A13). It agreed with the Commission that petitioners had failed to come forward with a "reasonably clear and substantiated estimate of losses" to support their request for a hearing (Pet. App. A12, n. 8), and that the agency was under no obligation to

[2] Notice of Inquiry in Docket No. 17,371, 7 F.C.C. 2d 853.

afford a hearing when the allegations, even if proved, would not support the relief requested (Pet. App. A 13).[3]

The court of appeals also rejected petitioners' contention that the issue of multiple and cross-ownership of CATV systems should have been designated for hearing in this proceeding, observing that the issue is presently pending before the Commission in a rule-making proceeding, and holding that the Commission "will be able to remedy undue concentration of control if it occurs in the interim by retroactive adjustments, provided they are reasonable" (Pet. App. A 16).

ARGUMENT

The only issue actually presented here is whether the Commission reasonably exercised its discretion in refusing to conduct an evidentiary hearing directed toward imposing special requirements, in addition to those already effective under its general rules,[4] on a new CATV system in a particular small market. The record on this issue has been thoroughly canvassed by the court below, and the instant petition presents no question of general importance warranting plenary review by this Court.

1. The court of appeals' extended analysis of petitioners' allegations clearly shows that on the record

[3] The court below noted, moreover, that the Commission's power to alleviate any impact of CATV in Colorado Springs which might be detrimental to the public interest did not cease with this case. Should future conditions call for extraordinary remedies to maintain healthy television broadcast service, those remedies will be available to petitioners (Pet. App. A 14–15).

[4] *E.g.*, the local carriage and non-duplication requirements (see Pet. App. A 5, 7, and n. 4).

before it the Commission was not required to hold a hearing before authorizing CATV service in Colorado Springs. Petitioners were seeking a departure from the general rules established for CATV authorizations in this particular instance. Before a hearing was necessary petitioners were required to demonstrate a valid basis for so proceeding. *United States* v. *Storer Broadcasting Corp.*, 351 U.S. 192, 205. Whether a sound basis for such a departure from the ordinary approach had been shown involved a matter peculiarly within the agency's discretion, subject of course to the requirement that the reasons for its decision be rationally explicated.

Petitioners assert that there is no clear standard for the showing necessary to obtain a hearing on a request for extraordinary relief under 47 C.F.R. 74.1109 regarding proposed CATV entry into a small market. However, the rule implements a viable substantive standard prescribed for determining whether special and additional requirements should be imposed—*i.e.*, a showing that the CATV system's extension of television signals "would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area" (47 C.F.R. 74.1107(c); Pet. App. C 4). See also *Second Report and Order, supra*, 2 F.C.C. 2d at 783. After a comprehensive review of the record the court below found the Commission's denial of petitioners' request for a hearing reasonable because petitioners' allegations did not warrant the requested relief even assuming they could have been established at a hearing (Pet. App. A 17–18). In these circumstances, additional review by this Court is unnecessary. *Uni-*

versal Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474, 490–491.[5]

Moreover, the Commission's authority to control CATV development detrimental to free off-the-air television service does not cease by reason of its decision not to impose special restrictions when service is initiated. Should future conditions call for extraordinary remedies to maintain healthy television broadcast service, they will be available, subject to due process considerations. But, as the court below observed, nothing in the record before the Commission and the court indicates a need for their imposition now (Pet. App. A 14–15).

2. The court of appeals properly upheld the Commission's refusal to designate the issue of multiple and cross-ownership of CATV systems for hearing in this proceeding. As the court noted, that matter is presently the subject of pending rule-making proceeding, an approach that is within the Commission's discretion to select as the appropriate one for its resolution. See *American Commercial Lines* v. *Louisville & Nashville R. Co.,* 392 U.S. 571, 590–593; *Federal Communications Commission* v. *Pottsville Broadcasting Company,* 309 U.S. 134. There was no showing that such

[5] In none of the cases relied on by petitioners were the Commission's standards of pleading, or the articulation of those standards, found to be inadequate. See *Channel 9 Syracuse, Inc.* v. *Federal Communications Commission*, 385 F. 2d 969 (C.A.D.C.); *Hubbard Broadcasting, Inc.* v. *Federal Communications Commission*, 385 F. 2d 979 (C.A.D.C.); and *Cedar Rapids Television Co.* v. *Federal Communications Commission*, 387 F. 2d 228 (C.A.D.C.). Moreover, all these cases, including the instant one, were decided by the District of Columbia Circuit. Thus, there is no conflict among circuits.

an issue was germane to conditions in the Colorado Springs television market, and in any event the results of the rule-making proceeding will be applicable to Vumore (Pet. App. A 15–16).[6]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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[6] Similarly without merit is petitioners' contention that certiorari should be granted so that the Commission's *proposed* rules governing CATV may be applied in this case. See Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18,397, 15 F.C.C. 2d 417 (December 13, 1968). The new rules are merely proposed, not in effect. The court below properly intimated "no opinion on whether or to what extent changes in the rules would affect the rights of the parties in further or different proceedings before the Commission" (Pet. App. A 17, n. 11). See also the Commission's Memorandum Opinion and Order ~~for~~ in Docket No. 18,397 (released May 16, 1969).

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